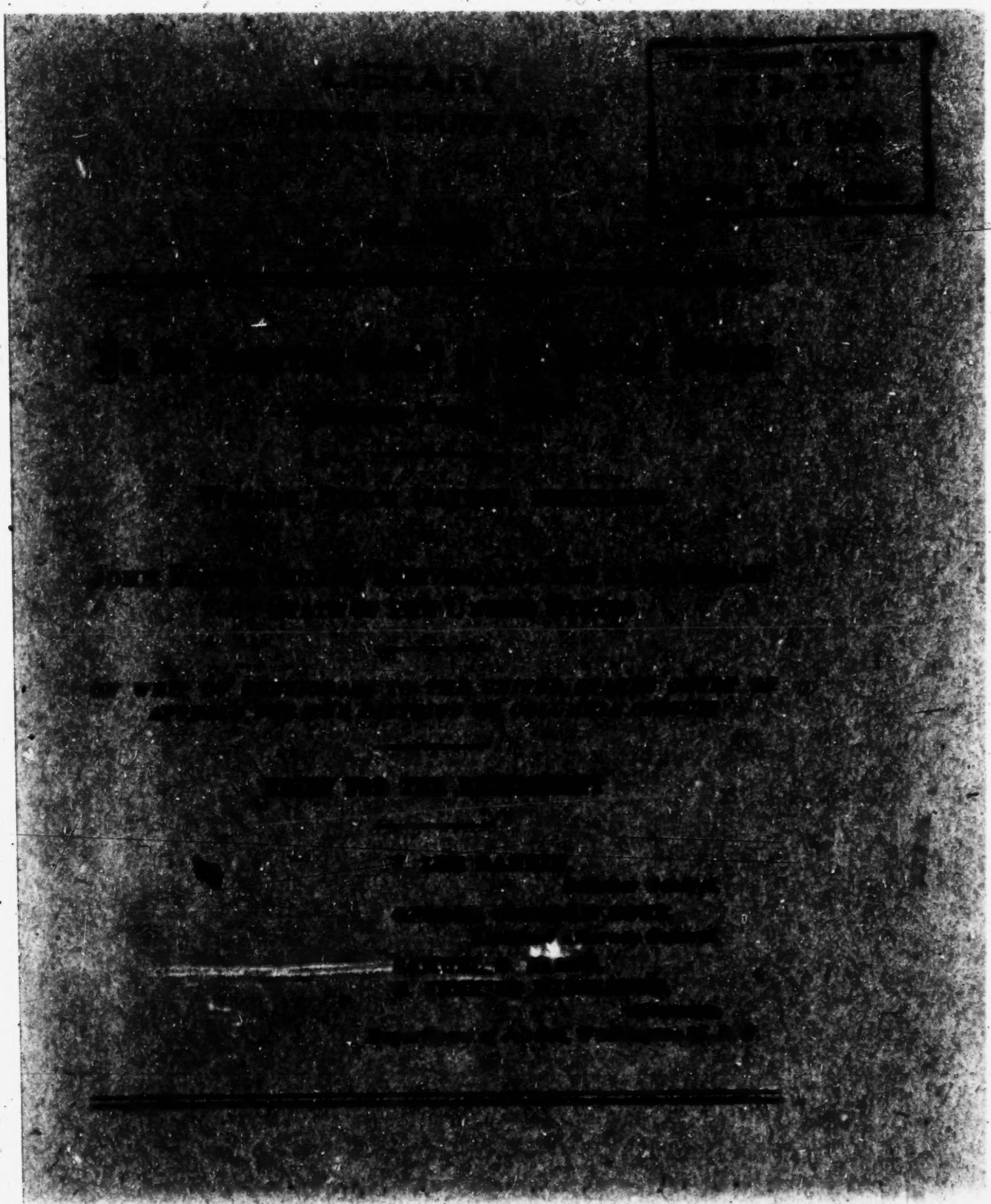

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 621

WELDON BRUCE DAYTON, PETITIONER

v.

JOHN FOSTER DULLES, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The unreported memorandum opinion of the District Court preceding the first appeal is printed at R. 56. The opinion of the Court of Appeals on the first appeal is not reproduced in the record but is reported at 237 F. 2d 43. The opinion of the District Court on remand (R. 280–289) is reported at 146 F. Supp. 876. The opinions of the Court of Appeals on the second appeal (R. 291–302) have not yet been reported.

JURISDICTION

The judgment of the Court of Appeals (R. 303) was entered on October 24, 1957. The petition for a writ

of certiorari was filed on November 21, 1957, and an order granting the petition and ordering the case consolidated with No. 481 was entered on January 6, 1958 (R. 304). The jurisdiction of this Court rests upon 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

In addition to the basic issues presented in *Kent, et al.* v. *Dulles,* No. 481, this case presents the following questions:

1. Whether the Secretary of State may validly deny a passport, after a hearing, to a person who the Secretary has reason to believe, on the balance of all the evidence, is going abroad to engage in activities which will advance the Communist movement for the purpose of knowingly and wilfully advancing that movement.

2. Whether the Secretary of State violated the requirements of substantive due process in concluding that petitioner was such a person.

3. Whether, in the circumstances of this case, the Secretary of State violated the requirements of procedural due process by relying in part upon confidential information to support the denial of petitioner's passport application.

4. Whether the denial of petitioner's passport application effected an unconstitutional infringement of his First Amendment rights.

STATUTES, PROCLAMATIONS, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent portions of Titles 8, 22 and 50 of the United States Code; of Presidential Proclama-

tions No. 2914 of December 16, 1950 and No. 3004 of January 17, 1953; of Executive Order No. 7856 of March 31, 1938; and of certain of the regulations of the Secretary of State relating to passports are printed in the Appendix to the Brief for the Respondent in *Kent, et al.* v. *Dulles,* No. 481, at pp. 102–116. The Passport Regulations issued in Departmental Order No. 108.162, effective August 28, 1952 (17 F. R. 8013) and the Rules of the Board of Passport Appeals are printed in the Appendix to this brief, *infra,* at pp. 108–117.

STATEMENT

In this action, petitioner seeks a judgment declaring that he is entitled to a passport and that the regulations issued by the Secretary of State governing the issuance of passports are unlawful; enjoining the Secretary from continuing to deny him a passport; and directing the Secretary to issue him a passport (R. 4). The facts are as follows:

1. *Application and initial proceedings in the Passport Office.*—Petitioner Dayton, a research physicist, filed an application for a passport on March 5, 1954, stating that he intended to visit Great Britain, Holland, France, Switzerland, Italy, and India and setting forth as the purpose of his trip the acceptance of a three-year appointment as a research physicist at the Tata Institute of Fundamental Research in Bombay (R. 6, 52). On April 14, 1954, the Director of the Passport Office informed him that the Department of State felt that it would be contrary to the best interests of the United States to issue him a pass-

port at that time (R. 10). After a meeting attended by petitioner, his attorney, and an officer of the Passport Office (R. 53), Dayton submitted an affidavit to the Passport Office confirming oral statements which he had made at the conference with respect to his past associations and organizational affiliations (R. 10–42, 53). He stated therein, *inter alia*, that he was not then and never had been a member of the Communist Party; that, with the possible exception of a casual and brief association with the Joint Anti-Fascist Refugee Committee, he was not then and had never been a member of any organization designated on the Attorney General's list; that he was not then and had never been engaged in any activities which, so far as he knew, supported the Communist movement; and that he was not going abroad to engage in any activities which, so far as he knew, would in any way advance the Communist movement (R. 12; see also R. 158–161).

The Director of the Passport Office thereafter informed Dayton that the Department adhered to its previous decision (R. 42–43), stating that "the Department took into consideration [Dayton's] connection with the Science for Victory Committee and his association at that time with various communists", but that "the determining factor in the case was Mr. Dayton's association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government" (R. 44).

Dayton filed a petition of appeal with the Board of

Passport Appeals, requesting, in accordance with Section 51.162 of the Rules of the Board (22 CFR, 1956 Supp., 51.162; App., *infra*, p. 115), additional information as to the reasons for the denial of his application (R. 44–48). The counsel for the Board of Passport Appeals informed Dayton's attorney that, while the information which the Board might disclose was limited by security and other considerations (R. 48), he was authorized to state that the file contained information indicating that Dayton was present at 65 Morton Street, New York City, in July or August of 1949, and in Apartment 6–I of the same address during the month of January, 1950. The letter also stated that Dayton's relationship with the following-named persons was considered pertinent: Marcel Scherer, Rose Segure, Sandra Collins, Frank Collins, Bernard Peters, Kurt Fritz Karl Sitte,[1] Louis S. Weiss, Alfred Sarant, and William Perl (R. 49).

2. *Hearings before the Board of Passport Appeals.*—

(*a*). *First hearing before the Board.*—

On January 18, 1955, Dayton, accompanied by his attorney, appeared at a hearing before the Board of Passport Appeals (R. 58–170). He testified as follows concerning the associations and activities which he had been informed were considered pertinent to the Board's review:[2]

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[1] Through a printing error, the Record at p. 49 lists "Kurt Fritz" and "Karl Sitte" as two people. Kurt Fritz Karl Sitte is a single individual; see R. 155.

[2] In some instances, this testimony overlaps that contained in Dayton's affidavit (R. 10–42); in a few instances, the testimony is found solely in the affidavit. References will therefore be made to both the transcript (R. 58–170) and the affidavit.

(*i*). *Dayton's association with the Science for Victory Committee.*—Dayton testified that the Science for Victory Committee, which he described as a loose organization with a lifetime of less than a year during 1943 and 1944, was established to support the so-called Science Mobilization Bill and to help make more efficient use of scientific manpower in the San Francisco Bay area (R. 17, 19, 22, 73, 82). The Committee was chiefly organized by Rose Segure and Frank and Sandra Collins (R. 18, 74), and Dayton served as chairman of the Committee throughout its existence (R. 19). In response to a question of a member of the Board of Passport Appeals inquiring whether there was, to Dayton's knowledge, "any Communist influence in organizing or running the affairs of the Science for Victory Committee", Dayton replied that he did not so regard it; that he had "been told in the course of investigations of me by the FBI agents and in the more recent years I have been told on various occasions that Frank and Sandra Collins and Rose Segure were well known Communists", but that they were not so known to him (R. 79). "I mean, they were left wing. I don't recall any time that any one of them ever made it clear to me that they were a Communist" (R. 79; see also R. 80–83). Dayton further testified that he had "been asked by agents of the FBI more or less as follows: 'didn't you realize that the Science for Victory Committee was dominated by Communists?'", and that his answer had been "No"; that he himself largely dominated it and set its policies; and that he "was not Communist" (R. 83; see also R. 92, 93).

(ii). *Dayton's association with Alfred Sarant and presence at 65 Morton Street, New York City.*— Dayton testified that he and his wife Carol met Alfred Sarant and his wife in Ithaca, New York, in the fall of 1946 (R. 28, 29, 97). The Daytons and Sarants became good friends and began building adjacent homes in the summer of 1947 (R. 29, 97). In June 1948 the Sarants moved in with the Daytons pending the completion of the Sarant home, and the two families continued to live under the same roof for the next eight months (R. 29, 98). Thereafter, the Daytons and the Sarants were next-door neighbors for approximately a year and a third (R. 98).

On or about July 18, 1950, Alfred Sarant came under intensive interrogation by agents of the FBI (R. 30, 98). Sarant told Dayton that he was being investigated in connection with an apartment which he had maintained in New York City which was believed to have been used for espionage activities (R. 30, 96–97, 99). Dayton testified that he immediately became aware that his wife was "deeply emotionally involved" with Sarant (R. 30, 100). She left Ithaca on July 24, ostensibly to break with Sarant and to look for an apartment in Boston (R. 30, 31, 101), but instead met Sarant in New York City and entered Mexico with him on August 13, 1950[3] (R. 31, 34, 101, 102). Dayton testi-

[3] It is to be noted, for such relevance as it may have, that Morton Sobell, convicted of the same offense as the Rosenbergs, fled to Mexico but was deported back to the United States and arrested on August 18, 1950. *United States* v. *Rosenberg, et al.*, 195 F. 2d 583, 589, 602 (C. A. 2); and 200 F. 2d 666 at 668.

fied that neither his wife nor Sarant have been heard from since (R. 34, 102).

Meanwhile, on August 2, 1950, FBI agents contacted Dayton and inquired into his background, including his connection with the Science for Victory Committee, Rose Segure, Frank and Sandra Collins, and Sarant (R. 31, 102). They further asked when Dayton had last been in New York City, whether he had been at 65 Morton Street in Greenwich Village, and whether he had moved furniture at that address with William Perl in January 1950[4] (R. 31, 32, 102, 103). Dayton told the agents that he had heard of

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See also *United States* v. *Perl*, 210 F. 2d 457, 461 (C. A. 2). David Greenglass, an admitted member of the Rosenberg ring, was arrested on June 15, 1950 (*United States* v. *Rosenberg, et al.*, 108 F. Supp. 798, 804 (S. D. N. Y.)), after having been advised to flee to Mexico by Julius Rosenberg, who gave him $5,000 for the trip. *United States* v. *Rosenberg, et al.*, 195 F. 2d 583, 589 (C. A. 2).

[4] The apartment at 65 Morton Street figured in Perl's trial for perjury in having falsely testified, before a Federal grand jury in the Southern District of New York in August 1950, that he did not know Julius Rosenberg or Morton Sobell. *United States* v. *Perl*, 210 F. 2d 457 (C. A. 2). In upholding Perl's conviction, the Court of Appeals took note of the following evidence adduced at the trial: In 1944 Perl, Rosenberg and others went to a "walk-up apartment on Morton Street in Greenwich Village where, after climbing five flights of stairs, they woke up Al Sarant * * *," talked for half an hour, and then "left Sarant's apartment" (*id.* at 460). In 1946, two of the witnesses met Rosenberg "outside of the apartment house where Sarant lived on Morton Street" and later met Perl and Sobell (*ibid.*). Perl subleased Apartment 6-I at 65 Morton Street from Sarant, lived there for a substantial period of time, and gave it as his voting residence in 1947 and 1948; he failed, however, to list that address in a statement of previous addresses in a "Personal [sic] Security Questionnaire" filled out for the Atomic Energy Commission (*id.* at 461).

the Morton Street apartment and of Perl through the Sarants, but denied having been at that address, having ever moved furniture in New York, or having any recollection of meeting Perl (R. 32, 103); after checking dates, he stated that he had been in New York from February 1 to February 5, but not during January (R. 31, 32, 102, 104).

In order to check the possibility of mistaken identity, Dayton was flown to Newark, New Jersey, on August 8, 1950, and introduced to Floyd Elwyn, Sr., and Mr. and Mrs. Floyd C. Elwyn, all of whom identified Dayton as a person they had seen in the apartment building at 65 Morton Street (R. 32–33, 104–106; see, *infra*, pp. 13–17). Floyd C. Elwyn added that he had seen Dayton there in July 1949 and January 1950, and that, on one of these occasions, Dayton was in the Sarant apartment eating breakfast in his pajamas (R. 32, 33, 104–106). Dayton denied ever having seen the Elwyns before, having been in New York City the previous summer, or having worn pajamas since the age of eleven, and in a statement subsequently submitted to the FBI, reiterated these denials and disavowed any espionage activities at any time (R. 32–34, 105–107). The substance of the foregoing denials, including those previously made to the FBI agents in Ithaca, were repeated at the Board hearing (R. 133, 134, 268, 269; see also R. 37, 40).

Dayton thereafter submitted a statement to the FBI concerning his whereabouts during the month of January 1950, in which he sought to document each day through references to his own research notes and

to log books maintained at the Cornell University cyclotron (R. 167–170; see also R. 29, 30, 33, 34, 108–117). In April and June, 1951, Dayton appeared under subpoena before federal grand juries in the Southern District of New York investigating the "second echelon" of the Rosenberg spy ring. The questioning there was similar to that of the FBI agents (R. 35, 36, 111, 116, 117, 134).

Dayton also testified at the Board hearing to his associations with Louis S. Weiss and his wife (R. 40, 132, 142–144); Marcel Scherer (R. 83, 84); Kurt Fritz Karl Sitte (R. 155–160); Maxwell Finestone, whom he knew through the Sarants in Ithaca and who told Dayton that he had lived at the 65 Morton Street apartment (R. 136–139); and Gary Pickard, to whom he had been introduced during the grand jury proceedings in New York (R. 139). Pickard at that time stated that he had lived at 65 Morton Street, remarking to Dayton that he seemed to remember meeting him "at 65 Morton Street and I think Max Finestone introduced us," a statement which Dayton denied (R. 140). Pickard did, however, look familiar to Dayton but he could not place him (*ibid.*).

Dayton told the Board that, since the FBI had told him a great deal about Sarant, he could not recall for sure whether he had any reason to believe that Sarant was a member of the Communist Party during the period he knew him, and that he was not aware at that time, if it was a fact, that Sarant was attending Communist Party meetings or was a member of a Communist organization (R. 153–155). He had no reason to believe Sarant was engaged in any subversive or

disloyal activities (R. 153–155). Dayton was sure that his wife, Carol, was never a member of or active in the Communist Party, her political views being essentially his own, which he characterized as "left of center, but I have never been intrigued enough by the Communists to ever entertain the idea of becoming a Communist Party member, and I have become increasingly so as time went on" (R. 41, 153, 161, 162). Dayton testified that his association with the Joint Anti-Fascist Refugee Committee lasted for only a few months in 1941 and 1942 (R. 12, 23, 24, 158, 159).

(*iii*). *Dayton's association with Bernard Peters.*— Dayton testified that he has maintained an intimate association with Bernard Peters since a short time after they met in 1938 and has no better friend than Peters (R. 15–17, 148–149). It was Peters who, in 1943, first told Dayton of the Science for Victory Committee (R. 1[illegible] 22, 85, 87). Peters at that time was working on a highly classified project, connected with the Manhattan Project, at the Radiation Laboratory in Berkeley, California (R. 16, 86). Dayton inquired through Peters concerning the possibility of a job at the Radiation Laboratory in the fall of 1945 and was interviewed but rejected on security grounds (R. 85, 86, 93, 94). Dayton suspected that the rejection was based in part upon his connection with the Science for Victory Committee (R. 88).

Petitioner testified that he was very sure that Peters was not a Communist[5] (R. 16, 80, 150, 151). Al-

[5] With regard to Dr. J. Robert Oppenheimer's testimony before an executive session of the House Committee on Un-

though he had no basis for saying that Peters' wife, Dr. Hannah Peters, could not have been a Communist, he had no reason for believing that she was, and was inclined to believe that the characterization of her, in the charges filed by the Atomic Energy Commission against Dr. J. Robert Oppenheimer, as an "organizer of the professional section of the Communist Party, Alameda County, California,"[6] was in error (R. 150, 151).

Peters, who is a leading cosmic-ray physicist, has been working at the Tata Institute in Bombay since 1951 and was instrumental in securing the offer of a position there for Dayton (R. 16, 17, 150). The opportunity to work with Peters was stated to be one of the chief reasons for petitioner's desire to go to India (R. 72).

(*iv*). *Dayton's purpose in traveling abroad.*— Petitioner testified that his purpose in desiring to go to India was to accept the position at the Tata Institute, where he would be working in pure physics and continuing his work as a cosmic-ray physicist, a field of research which he characterized as devoid of secrecy (R. 71, 72, 146). Dr. Dale R. Corson, a Professor of Physics and an associate of Dayton at Cor-

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American Activities, in which Dr. Oppenheimer characterized Peters as "a dangerous man and quite Red," and testified that Peters had told him that he had been a member of the Communist Party in Germany, see U. S. Atomic Energy Commission, *In the Matter of J. Robert Oppenheimer*, Transcript of Hearing before Personnel Security Board, 1954, pp. 210–211. For Dr. Oppenheimer's subsequent explanation and partial retraction of this testimony, see *id.* at 211–215.

[6] *Id.* at 5.

nell University, testified before the Board at petitioner's request (R. 118–132, 127). In addition to giving testimony tending to corroborate Dayton's accounting of his whereabouts during the month of January 1950 (R. 119–124, 127, 128), Dr. Corson testified that, despite the fact that, in all fields related to nuclear physics or indeed any kind of physics, there have been developments which have been classified and which have gone into classified laboratories such as Los Alamos, and despite the fact that the field of cosmic-ray research is an allied field to that of atomic energy research, cosmic-ray research itself and its results are unclassified (R. 126). So far as he knew, the work at Tata Institute was largely in cosmic rays and that none of the work there was classified (R. 129).

(*b*). *Second hearing before the Board.*—

The hearing of January 18, 1955 was adjourned subject to reopening (R. 166), and, on March 29, 1955 the hearing was reconvened in New York City for the purpose of offering petitioner an opportunity to confront three witnesses (R. 171), Floyd Elwyn, Sr., and Mr. and Mrs. Floyd C. Elwyn, all of whom appeared voluntarily and testified under oath substantially as follows to their recollection of Dayton's presence some five years earlier at 65 Morton Street:

Floyd C. Elwyn: Floyd C. Elwyn, superintendent of the apartment building at 65 Morton Street, was on the witness stand for close to three hours, most of that time under cross-examination by Dayton's attorney (R. 221). He testified that he had seen Dayton at 65 Morton Street on four occasions and that, on

one of these occasions, Dayton was in Apartment 6–I (R. 174–245).

Admitting at the outset that he was "possibly * * * a little bit mixed up on dates right now" since it had "been quite a long time since things have passed" (R. 175), Elwyn testified that the first time he had seen petitioner was approximately a year after he had started working at 65 Morton Street.[1] Elwyn stated that he recalled having seen Dayton, without knowing who he was, on two occasions in approximately September or October 1949 when they walked past each other in the lower hall of the apartment

[1] Elwyn initially set the date when he began working at 65 Morton Street in the following colloquy (R. 174):

"* * * I have resided there now since, let me see, just about six years I believe I have resided there continuously.

"QUESTIONS BY THE CHAIRMAN:

"Q. Since about 1949?—A. That's right, sir.

"Q. Do you recall roughly the month?—A. I came there in October.

"Q. Of '49?—A. Of '49, yes."

Accordingly, Elwyn initially testified that he had first seen petitioner in September or October of 1950—an obvious impossibility, as petitioner and his attorney knew, since it was in August 1950 that Elwyn identified Dayton at the Newark Airport as the man he had seen at 65 Morton Street in the summer of 1949 and January 1950 (R. 32, 33, 104–106, 175, 193, 207). Elwyn continued throughout his testimony to date the incidents by reference to the time he began working at 65 Morton Street, and to express his uncertainty as to the exact months in question due to the lapse of time (R. 193, 194, 217). After referring to his income tax forms during a recess, Elwyn testified that he had begun working at 65 Morton Street in October 1948 (R. 225, 227). He therefore placed the incidents relative to petitioner in approximately September or October and December of 1949, to the best of his recollection (R. 225, 226; see also R. 219).

building (R. 214–217, 236, 237, 244). In addition, according to Elwyn, mail had come for Dayton and the mailman had asked for Dayton's apartment number (R. 175).

The first time Elwyn really noticed Dayton, he testified, was in Apartment 6–I, after Sarant had notified the office that the apartment was to be vacated by the first of the month (R. 174–176, 195, 197, 199). Elwyn testified that he entered the apartment and found the person he now knows as Dayton sitting at a card table in pajamas eating crackers and milk, and that there ensued a conversation relative to Sarant and to obtaining Finestone's cooperation in seeing to the removal of the furniture[8] (R. 175–177, 199, 202–203).

The witness testified that he next saw Dayton three or four days later, on a Saturday or Sunday morning toward the last of the month, when Dayton, Finestone, Perl, and a fourth man, all of whom appeared very friendly with each other, moved the furniture from Apartment 6–I to the basement (R. 177, 178, 206, 207). During the moving, Elwyn came to the door of his basement apartment and looked out through the screen door; Dayton and Finestone were carrying furniture and stopped directly in front of Elwyn's door, facing him, and placed the furniture across the hall (R. 212, 213). Petitioner was wearing khaki

[8] This is the only direct evidence in the open record indicating that Dayton was present in Apartment 6–I itself. The Secretary made no finding based directly upon this testimony, finding that, on the basis of the open record, Dayton "was present * * *, on more than one occasion, in the apartment building at 65 Morton Street * * *" (R. 277).

pants and, Elwyn believed, a suntan shirt (R. 213).

Elwyn further testified to the identification at Newark Airport which had taken place some six or seven months later (*supra,* p. 9) and to a subsequent identification of Dayton at FBI Headquarters in Foley Square, New York, during a hearing (R. 179–181). The witness stated that "[t]here is no doubt whatsoever in my mind, which I have stated before and I still state, there is no doubt in my mind" that Dayton, who had been in the hearing room throughout Elwyn's testimony before the Board, was the same man whom he had seen in and around Apartment 6–I, 65 Morton Street (R. 243, 244).

Mrs. Floyd C. Elwyn: Mrs. Floyd C. Elwyn was called next and testified that she saw Dayton, with Finestone and Perl, moving furniture from Apartment 6–I to the basement outside the Elwyns' apartment door (R. 246, 247). Although she could not recall the exact date, she had some idea that it was around January 29, 1950, possibly a Sunday (R. 247, 251, 252). She stated that she went out into the basement and took "a good look at the gentlemen" because she was curious to see who the people were who had lived in what the other tenants referred to as the "ghost" apartment (D. R. 248). When the Chairman of the Board indicated Dayton and asked the witness whether he was one of the three men, she replied: "Yes, he was one of the three men. That I do definitely remember" (*ibid.*). Dayton was wearing suntans at the time (R. 247). Mrs. Elwyn testified that she had observed the three men for approximately five minutes and "took a close look at [Dayton's]

features" (R. 253), and it was by his features, which she described as average, that she was able to identify his photograph when the FBI, less than eight months later, showed her several pictures and asked her if she recognized Dayton [9] (R. 250, 253, 254).

Mrs. Elwyn also thought she might have seen Dayton in the lower hall several months prior to the furniture moving incident (R. 249).

Floyd Elwyn, Sr.: Floyd Elwyn, Sr., testified that he had seen Dayton in the 65 Morton Street entrance, on the landing, on Morton Street, and in the Emerald Grocery Store on Hudson Street (R. 255, 256, 262), placing the dates originally as somewhere between 1943 or 1944 and 1950 but later stating that as near he could recall it was in the latter 1940's (R. 260). Elwyn Sr. first learned Dayton's name, he testified, when he heard a man say to Dayton, who was standing on the stairs near the mailboxes, words to the effect that "There is no mail for you, Mr. Dayton" (R. 261, 262). The witness testified that he remembered Finestone, Perl (who received mail at Apartment 6–I), and Sarant, but that he had never seen Dayton in their company (R. 258, 259).

At the close of the hearing, Dayton reiterated his prior denials, adding that he had never worn khaki shirts and pants together prior to 1952 (R. 268–270).

3. *Initial denial by the Secretary.*—On September 7, 1955, the Secretary of State informed petitioner that, after receiving the recommendation of the Board of

[9] The record would appear to indicate that Floyd C. Elwyn also made a photo identification of Dayton (R. 240, 241, 244).

Passport Appeals and after "a review of the entire record", he had disapproved his request for passport facilities "under Section 51.135 of the passport regulations" [10] (R. 4, 5).

4. *Initial proceedings in the courts below and subsequent proceedings in the Department of State.*—Dayton then filed his complaint in the District Court (R. 1–5), which entered summary judgment for the Secretary and dismissed the complaint (R. 56, 57). On ap-

[10] Section 51.135 (22 CFR, 1956 Supp., 51.135) provides as follows:

> *Limitations on issuance of passports to persons supporting Communist movement.* In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:
>
> (a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;
>
> (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement.
>
> (c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

peal, the judgment of the District Court was reversed and the case remanded with directions for further proceedings by the Secretary on the ground that the letter of denial should have specified the subsection of the regulation upon which the denial was based and should have set forth findings sufficient to bring Dayton within the terms of the subsection. *Dayton* v. *Dulles*, 237 F. 2d 43, 44.

Following reconsideration, the Secretary of State rendered his Decision and Findings and again denied the application (R. 275–278). Due to the importance of the Decision and Findings to the case, they are set forth here verbatim (see R. 275–278):

> I have examined the files of the Department of State concerning the passport application of Weldon Bruce Dayton, including the proceedings in the Passport Office and before the Board of Passport Appeals, including confidential security information, and have found and concluded as follows:
>
> I.
>
> *a.* I find that applicant was active in the Science for Victory Committee while at the University of California during 1943–44, serving as Chairman of the organization during much of that period. As Chairman he associated with Frank and Sandra Collins, and Rose Segure, who had been instrumental in organizing the said organization. This finding is based on information contained in the open record, including applicant's own statements.
>
> *b.* Confidential information contained in the files of the Department of State, constituting

a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, indicates that the above-named organization was conceived and organized by Communist Party officials as a front for propaganda and espionage activities; and that Frank and Sandra Collins and Rose Segure were members of the Communist Party at the time of their association with applicant and the Science for Victory Committee.

II.

a. I find that during the period 1946–1950, at Ithaca, New York, applicant maintained a close association and relationship with one Alfred Sarant. At applicant's invitation, Sarant and his wife lived in applicant's home for a period of eight months in 1947–1948, pending the completion of the Sarant home next door to applicant's home. Thereafter Dayton and Sarant were neighbors until July, 1950. On approximately July 18, 1950, Sarant became the subject of intensive interrogation by the Federal Bureau of Investigation. Approximately a week after the interrogation had begun Sarant departed from Ithaca and subsequently entered Mexico with applicant's wife. This finding is based on information contained in the open record, including applicant's own statements.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, establishes with respect to Alfred Sarant that he was an active member of the Communist Party; that he admitted said member-

ship during the years 1943 and 1944; and that he was involved in the espionage apparatus of Julius Rosenberg.

III.

a. I find that the applicant was present during 1949 and 1950, on more than one occasion, in the apartment building at 65 Morton Street, New York City, in which Alfred Sarant was lessee of apartment 6–I. This finding is based on information contained in the open record.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, indicates that Sarant's apartment at 65 Morton Street, New York City, was used by Julius Rosenberg and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power.

IV.

a. I find that since 1938 the applicant, an experienced physicist, has maintained a close association and relationship with one Bernard Peters; that Peters was responsible for the applicant's offer of employment at the Tata Institute of Fundamental Research, Bombay, India; and that one of the primary stated purposes of the applicant's proposed travel abroad is to work in close collaboration with Peters at the Tata Institute. This finding is based on information contained in the open record, including applicant's own statements.

b. Confidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals, and myself, indicates that Bernard Peters, who recently renounced his American citizenship, has held membership in the Communist Party outside of the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent.

V.

I have reason to believe, on the balance of all the evidence, that the applicant is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement. I have reached this conclusion on the basis of the foregoing findings together with the confidential information relating thereto, as well as other confidential information contained in the files of the Department of State, the disclosure of which might prejudice the conduct of United States foreign relations. I have also taken into consideration the serious doubts as to applicant's general credibility raised by the applicant's denial in the face of convincing contrary evidence, including the oral testimony of three apparently disinterested witnesses of ever having been present at 65 Morton Street. The passport application of Weldon Bruce Dayton is therefore denied under Section 51.135 (c) of the Passport Regulations (22 CFR 51.135 (c)), and because the issuance of a passport would be contrary to the national interest.

VI.

The confidential information referred to in paragraphs I (b), II (b), III (b) and IV (b) above relates to the internal security of the United States. The substance of this confidential information was disclosed to the applicant during the consideration of his passport application. To disclose publicly the sources and details of this information would, in my judgment, be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security. Moreover, it would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area; and might, with respect to information referred to in paragraph V, prejudice the interest of United States foreign relations.

5. *Further proceedings in the courts below.*—When the case returned to the District Court, the court again granted summary judgment for the respondent and dismissed the complaint (R. 289–290; see also R. 280–289).

The Court of Appeals affirmed, Judge Fahy dissenting (R. 303). In the majority opinion, Judge Prettyman noted that the *Briehl* decision (see No. 481, this Term) upheld both the validity of the Passport Regulations (which he held were "meticulously complied with" in this case (R. 300)) and the authority of the Secretary to refuse to issue a passport to

an applicant found, as here, to be going abroad knowingly and wilfully to advance the Communist movement (R. 294). The opinion ruled that the Secretary's statement that the issuance of a passport to Dayton "would be contrary to the public interest" plainly meant the public interest in internal security and foreign affairs, in view of the Secretary's finding as to Dayton's purpose (R. 295). Turning to the Secretary's partial reliance upon confidential information, Judge Prettyman's opinion held that, in the circumstances of this case and in the light of the Secretary's stated reasons for non-disclosure, the Secretary "need not disclose the information but he may act upon it" (R. 295), since liberty of travel is subject to limitation in the "community interest" (R. 298–299). Basing his conclusions upon "helpful guideposts in the principles laid down by the [Supreme] Court in different fields" (R. 295), notably in *United States* v. *Curtis-Wright Corp.*, 299 U. S. 304, and *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103 (R. 296–298), Judge Prettyman summarized the court's resolution of the problem as follows (R. 299):

> Americans always resent and oppose the deprivation of liberty upon the basis of undisclosed information. We do so in this area. We would not agree to it except in necessitous circumstances of public concern. Such circumstances are here.

Judge Fahy's dissenting opinion did not reach the issue of confidential information. Adhering to the views expressed in his *Briehl* dissent—that under 8

U. S. C. 1185 the Secretary has "no greater power * * * than to deny the passport when necessary 'to prevent the reasonable likelihood of harm to our national defense or to the conduct of our foreign affairs' "—he declined to interpret the Secretary's findings in this case as "framed within those criteria" (R. 301). He read the finding as to Dayton's purpose as "subsidiary to the basic finding framed in terms of the 'national interest' "; as a result, he said, the denial had "not focused upon the question whether the grant would be likely to cause harm to national defense or to the conduct of foreign affairs". He therefore felt that the case should be returned to the Secretary for further consideration (R. 302).

SUMMARY OF ARGUMENT

I

A. The issues of substantive and procedural due process raised in this case by petitioner in connection with the denial of his passport application must be considered in the light of all the circumstances, including the nature of the problem dealt with and the scope of the powers exercised. The travel control program authorized by 8 U. S. C. 1185 represents a joint congressional and Executive exercise of the war power and the foreign affairs power. History shows that, where the national interest requires the invocation of these powers in such a way as to impinge upon the interests of individual citizens, the courts will go far in permitting limitations and procedures with respect to such individuals which would not be accepted if lesser national interests were at stake.

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B. Here, the very purpose of Congress in enacting the travel control statute was to permit the Secretary of State to exercise emergency travel control authority, through passport denials, upon a lesser evidentiary basis than that which petitioner contends is required by the Due Process Clause. The history of the statute reveals that Congress sought to overcome the existing inability of the Government to restrict the travel of individual citizens except in cases where it could obtain—and divulge in open court—evidence of past criminal activity sufficient to support a criminal conviction resulting in incarceration. The national interest required, however, that the Government be permitted to prevent the border-crossing of persons reasonably suspected of engaging in activity on behalf of a hostile foreign power in times of peril, and it was for this reason that the statute was originally passed in 1918 and subsequently reenacted. Even without the legislative history, however, it is plain that administrative travel restriction (as distinguished from incarceration), designed to avert reasonably predictable future activity inimical to the national security, serves no legitimate purpose if its enforcement must depend upon the quantum and type of evidence required by a judicial trial, whether criminal or civil. Today, these travel restrictions are enforced under regulations, self-imposed by the Secretary of State, which provide numerous protections of both a procedural and substantive nature for the benefit of passport applicants. As our brief in No. 481 shows, the general travel control program, as envisaged by Congress and as established by the Secretary of State, is constitutional.

II

A. The Secretary's finding that he has "reason to believe, on the balance of all the evidence, that [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement", is not violative of substantive due process as unconstitutionally vague. Read as a whole and in light of the finding of scienter and purpose, the words of the finding are clear and meaningful. The congressional definition of the "Communist movement" contained in the Internal Security Act of 1950 has been cited by this and other courts, and the meaning of the word "advance" is unmistakable in its context. Nor is there any infirmity in the Secretary's further finding that the "issuance of a passport would be contrary to the national interest" in this case. That finding—drawing its content from the statute, the Presidenial proclamations, the regulation, and the findings—does not detract from the specific finding as to petitioner's purpose. Both findings relate to present intent and possible future conduct; in this "speculative" area, findings of this type are more than adequate, as is the decisional standard of "reason to believe, on the balance of all the evidence".

B. The ultimate conclusions just discussed are, moreover, amply supported by the Secretary's findings and the record in this case, and are immune from reversal on the ground that they were arbitrary or capricious. The pattern of petitioner's activities and associations reflected in the findings must be

read together with the fact that the Secretary's ultimate conclusion takes into consideration undisclosed evidence relating to the conduct of foreign affairs. It must be assumed that this information fills in any possible hiatus between the factual findings and the ultimate conclusion. But even without this assumption, the findings as to petitioner's past, taken all together, give rise to a legitimate inference that petitioner has been closely connected with the Communist movement. This is particularly true when they are read in the light of the Secretary's legitimate "serious doubts" as to petitioner's general credibility, caused by his denial, in the face of credible contrary testimony by three apparently disinterested witnesses, of his presence at 65 Morton Street—a fact which could readily form a link in a chain of evidence incriminating under the espionage laws. Petitioner's attack upon the credibility of these witnesses is not supported by the record. Nor is there merit to his claim that the denial of his application upon the grounds stated by the Secretary constitutes a judgment of "guilt by association". There is more than mere "association" revealed by the record and findings; in any event, associations may lawfully be considered in making an administrative determination of the kind here made by the Secretary. Cf. *Adler* v. *Board of Education,* 342 U. S. 485, 493. While petitioner could possibly be, on the record befor this Court, the innocent victim of circumstance he claims to be, it was certainly not arbitrary nor capricious for the Secretary to conclude to the contrary.

III

A. In relying in part upon information and sources and details of information undisclosed to petitioner, the Secretary did not violate petitioner's rights to procedural due process. The record reveals that, with the exception of information undisclosed because to do so might prejudice foreign relations, petitioner had adequate opportunity to know the grounds on which the denial of his application was ultimately based and to attempt to explain or refute the facts underlying those grounds. It is clear that petitioner was aware, at an early stage in the proceedings, of virtually all of the information available to the Department of State and relating to petitioner's past which he could best hope to refute—*i. e.*, his own past activities and associations—as contrasted with the sources and details of information relating to persons and organizations with whom he had associated. Petitioner admitted all but two of the alleged activities and associations, and with respect to his two denials, the Department confronted petitioner with three disinterested witnesses and permitted cross-examination. The non-disclosure of the sources and details of the other information did not unduly hamper petitioner's presentation of his case.

B. Such withholding of sources and details of information as is revealed by this record was justified by the considerations on which the Secretary of State acted. The conflicting interests are such that petitioner's interest in full disclosure must be accommodated to meet the national interest requiring non-disclosure, for petitioner's right is not absolute. The suggestion

that the Secretary resolve the conflict by issuing a passport, thus protecting the government's interests in non-disclosure, is in effect a suggestion that the Secretary choose to abandon the travel control system, found essential to the national security by Congress and the President, in order to preserve the Government's intelligence system and certain aspects of its foreign relations. But petitioner's interests are not such as to require so drastic a choice by the Secretary.

Clearly, the Secretary has stated adequate reasons for withholding the information, sources, and details here sought. To require him to disclose information which may not be disclosed without prejudice to the interest of foreign relations would be unprecedented. As to the non-disclosure of sources and details of information relating to internal security, the reasons stated for such non-disclosure are plainly adequate in light of the decisions of this and other courts, especially since it is the Secretary himself who has reviewed the information and held that it may not be disclosed. The Government has a legitimate interest in maintaining investigative sources and methods, as well as security and intelligence relations, which are essential to keeping itself informed of matters relating to internal security. This is especially true in this particular case, where the internal security considerations relate to possible espionage on behalf of an adverse foreign power.

Where, as here, Congress has authorized the use of undisclosed information in an emergency situation, an individual's claim to unlimited confrontation, based essentially upon the Sixth Amendment, is not suffi-

cient to overcome the national interest. This Court has permitted the use of such information in other areas, and in both judicial and administrative proceedings, particularly in cases involving the war power and the conduct of foreign relations. And the right of the Secretary of State to act upon such information in passport proceedings involving travel control has been specifically recognized by competent authorities. The case of *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9), strongly relied upon by petitioner, is plainly distinguishable and is not persuasive to the contrary.

Moreover, there are no practical alternatives to the use of undisclosed sources and information in the operation of the travel control program. Consequently, petitioner in fact asks the Court not only to drain the travel control statute of its vitality but to place permanently disabling restrictions upon the Government's power to enforce reasonable emergency travel controls.

IV

As we have demonstrated elsewhere in this brief and in our brief in No. 481, the denial of a passport to petitioner does not violate his rights under the First Amendment.

ARGUMENT

In the *Kent* and *Briehl* case, No. 481, the administrative processing of the petitioners' passport applications was halted in the Passport Office due to the petitioners' refusal to submit affidavits relating to Communist Party membership. The basic issue raised in that case is whether the Secretary of State

is validly authorized by statute and the Constitution to refuse to issue passports, so as to restrict foreign travel, for reasons relating to activity in the Communist movement, including Communist Party membership.

In the present case, petitioner Dayton complied with the affidavit requirement at issue in *Kent* and *Briehl*. Accordingly, the processing of Dayton's application continued in accordance with the pertinent passport regulations, through hearings and a final decision on the merits by the Secretary of State. The basic issue raised in *Kent* and *Briehl* is, of course, of fundamental importance in this case, for, unless the Secretary is authorized to deny passports on grounds related to Communist activity, the denial of Dayton's application cannot stand. Our arguments in this brief are therefore premised upon those in our brief in *Kent* and *Briehl* as to the basic authority of the Secretary of State.

The additional questions in this case involve, in brief, the validity of the procedures accorded petitioner in the processing of his passport application, and the validity of the ultimate denial of the application on its merits by the Secretary of State. These are primarily questions of due process, although First Amendment considerations are also raised and will be discussed. Applying the yardsticks traditionally employed by this Court in determining the requirements of due process in a particular case, we submit that the denial of petitioner's passport application is constitutionally sustainable. In reaching this conclusion, we take into consideration the nature of the Due Process

Clause, the scope of the war power and foreign affairs power here involved, the aim of Congress in enacting the travel control statute, and the standards, procedures, findings, and conclusions adopted and applied in this case.

I

INTRODUCTION—DUE PROCESS AND THE CONTROL OF CITIZEN TRAVEL IN TIMES OF EMERGENCY

The Secretary's denial, after extensive administrative proceedings, of petitioner's passport application raises two general types of problems: (*a*) substantive—relating to the grounds for denial, and the ultimate sufficiency of the showing that those grounds exist in petitioner's case; and (*b*) procedural—relating to the fairness of the administrative proceedings. Since petitioner claims that, on both grounds, he has been denied due process, the Secretary's action must be tested by the standards which are appropriate for the administrative restriction of foreign travel in emergency times. It will therefore be helpful, at the outset, briefly to recall the relationship of due process to the defense power and the foreign affairs power which are being exercised in this case, and also to set forth the specific purposes of Congress in establishing an *administrative* control of foreign travel, rather than a penal system to be enforced wholly by means of the criminal code.

A. DUE PROCESS TAKES ACCOUNT OF THE NATURE OF THE PROBLEM AND OF THE POWERS EXERCISED

The court below set its decision on the requirements of due process within the frame of this Court's hold-

ing in *West Coast Hotel Co.* v. *Parrish,* 300 U. S. 379, 391 (R. 295–296). Paraphrased slightly to meet the present case, that holding was as follows:

> * * * The Constitution does not speak of freedom of [travel]. It speaks of liberty and prohibits the deprivation of liberty without due process of law. * * * But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

Mr. Justice Holmes observed in *Moyer* v. *Peabody,* 212 U. S. 78, 84, that "it is familiar that what is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation." See also, *e. g., Wolf* v. *Colorado,* 338 U. S. 25, 27; *Federal Communications Comm'n* v. *W. J. R.,* 337 U. S. 265, 275; *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U. S. 123, 163; *Betts* v. *Brady,* 316 U. S. 455, 462; *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 341. While the Due Process Clause, in common with other provisions of the Constitution, creates rights in individual citizens, the nature of those rights is not invariable, for the Constitution also recognizes equally vital powers in the Government, such as the commerce and the war powers. When these rights and powers require accommodation, the problems posed can be resolved only

by "balancing the conflicting individual and national interests involved." *American Communications Ass'n v. Douds*, 339 U. S. 382, 410.

The circumstances to be considered in balancing the conflicting individual and national interests in this case necessarily include the nature of the two powers here exercised in concert by the Congress and the Executive:—the defense and war power, and the foreign affairs power. Our brief in No. 481 calls attention to the broad scope of the war and defense power as supporting the validity, whether during time of actual war or of proclaimed national emergency, of the travel control statute (8 U. S. C. 1185) (pp. 89 *ff*). History shows that where the national interest requires the invocation of that power, the courts will go far in permitting limitations and procedures which would not be accepted if lesser national interests were at stake. *E. g., Hirabayashi* v. *United States*, 320 U. S. 81; *Korematsu* v. *United States*, 323 U. S. 214; cf. *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 591.

As with the war power, the importance of the foreign affairs power in assaying the travel control program has been discussed in our brief in No. 481. Again, the nature of that power, the peculiar role of the President and the Secretary of State in its exercise, and their broad discretion in foreign affairs matters, are highly relevant to the due process questions presented in this case. This Court set the key in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 319–320, when it said:

> It is important to bear in mind that we are here dealing not alone with an authority vested

> in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations.

Due process in a case like this necessarily takes its character and its color from the problems to be faced, the national powers being exercised, the alternative solutions, and the teachings of our history.

B. THE PURPOSE OF CONGRESS IN ENACTING THE TRAVEL CONTROL STATUTE WAS TO PERMIT THE SECRETARY TO REFUSE TO ISSUE A PASSPORT, AND THUS TO RESTRICT TRAVEL, ON EVIDENCE SATISFACTORY TO HIM, EVEN THOUGH SUCH EVIDENCE WOULD BE INSUFFICIENT TO SUPPORT A CRIMINAL CONVICTION

1. A further potent element in measuring due process in this case is the specific purpose of Congress in enacting the travel control statute (8 U. S. C. 1185) and the situation which that statute was designed to remedy. Both these factors are peculiarly relevant to petitioner's principal objections here: —that the Secretary's findings are lacking in proper evidentiary support, primarily because they are in part premised upon information undisclosed to petitioner and the courts; and that the Secretary's findings did not compel him to conclude that petitioner wishes to travel abroad for nefarious purposes. The history of the travel control statute shows that it was enacted precisely because, prior to its enactment, evidentiary requirements such as those petitioner urges prevented the effective restriction of travel necessary in an emergency situation.

The Brief for the Respondent in No. 481 shows that Congress, in choosing passport control as the means

of effectuating travel control, utilized not only congressional power but also the Secretary's recognized discretion in passport matters, leaving him wide latitude to determine, in the light of the national interest, which individual citizens would be granted passports—and thus be permitted to travel abroad—and which citizens would be restrained by the withholding of passports (pp. 29 *ff*). Congress acted on the assumption that, in the absence of such a statute, no person suspected of espionage, subversion, or other activities detrimental to the national safety could be prevented from leaving the country—no matter how strong the suspicion—unless the Executive Branch took him into custody and produced competent evidence of past criminal activity sufficient to withstand a writ of habeas corpus and to justify criminal prosecution.

It was precisely this evidentiary obstacle which the 1918 Act sought to overcome. Congress envisaged that, in issuing passports under the statute's provisions and in the light of emergency conditions, the Secretary of State would act as in his best judgment the situation seemed to require. He was not to be bound by technical rules of evidence, nor was he to deny a passport only in those cases where the substantial evidence in a public record seemed sufficient to satisfy a court that such a restraint was justified.

This was made clear in the congressional statement of the conditions which the Act was designed to remedy, contained in the Report of the House Foreign Affairs Committee which accompanied the bill enacted

into law in 1918 (H. Rept. No. 485, 65th Cong., 2d Sess., pp. 2–3; emphasis added):

> The bill is intended to stop an important gap in the war legislation of the United States. * * *
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> * * * * * *
>
> * * * That some supervision of travel by American citizens is essential appeared from statements made before the committee at the hearing upon the bill. One case was mentioned of a United States citizen who recently returned from Europe after having, to the knowledge of our Government, done work in a neutral country for the German Government. There was *strong suspicion* that he came to the United States for no proper purpose. Nevertheless *not only was it impossible to exclude him but it would now be impossible to prevent him from leaving the country if he saw fit to do so. The known facts in his case are not sufficient to warrant the institution of a criminal prosecution,* and in any event *the difficulty of securing legal evidence from the place of his activities in Europe may easily be imagined.*
>
> * * * * * *
>
> *It is essential to meet the situation that the Executive should have wide discretion and wide authority of action.* No one can foresee the different means which may be adopted by hostile nations to secure military information or spread propaganda and discontent. * * *
>
> The Committee was informed by representatives of the executive departments that the need for prompt legislation of the character suggested is most pressing. There have recently been numerous *suspicious* departures for Cuba which it was *impossible to prevent.* Other indi-

vidual cases of entry and departure at various points have excited the greatest anxiety. This is particularly true in respect of the Mexican border, passage across which can not legally be restricted for many types of persons *reasonably suspected* of aiding Germany's purposes.

When the bill came to the House floor for debate Congressman Flood, the committee representative, stated (emphasis added):

> * * * the Government is now very much hampered by lack of authority to control the travel to and from this country, even of people *suspected* of not being loyal, and even of those whom they *suspect* of being in the employ of enemy governments. [56 Cong. Rec. 6029.]
>
> * * * * *
>
> There are [persons] whose loyalty is *suspected*, but there is *not enough evidence to convict them in a court of justice.* [*Id.* at 6064.]
>
> * * * * *
>
> * * * Our ports are open, so far as the law is concerned, to alien friends, citizens, and neutrals, to come and go at will and pleasure, and that notwithstanding the Government may *suspect* the conduct and the intention of the individuals who come and go. [*Id.* at 6065.]
>
> * * * * *
>
> * * * If there are American citizens in foreign lands * * * [whose] conduct subjects them to charges of disloyalty or treason they should be properly dealt with. But many of them have conducted themselves so that the charge of disloyalty or treason *could not be sustained in a court of justice*, and yet our Government knows that they are not loyal and

> that their presence here would be dangerous to the country. [*Id.* at 6066.]

Congressman Huddleston objected to the bill's provision for controls upon entry (as distinguished from those upon departure)[11] which Congressman Flood was discussing in the last quoted paragraph. Congressman Huddleston therefore introduced an amendment which would strike the requirement of a passport for entry into the United States by a citizen (56 Cong. Rec. 6063), stating that while he was "willing to concede" that exit should be controlled in the manner contemplated (*id.* at 6064), he objected to entry controls (*id.* at 6063; emphasis added):

> * * * When we pass this bill we should understand once and for all that we are clothing some little subordinate far down the line, who perhaps has never seen the President, with power to bar an American citizen out of his native country *upon a mere suspicion and without a syllable of proof against him.*

After debate, the amendment was defeated, 45 to 5 (*id.* at 6067).

In view of the legislative purpose of authorizing travel controls on evidence satisfactory to the Secretary, and in the light of the situation as outlined in the

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[11] The requirement of a passport for entry into the United States is, of course, not at issue in this case, since petitioner is in this country and wishes a passport in order to depart. In any event, the general practice of the Department of State in the case of passport applicants or holders abroad found to come within the provisions of Section 51.135 of the regulations is to issue or validate a passport good only for immediate return to the United States, thus permitting re-entry. See 22 CFR, 1956 Supp., 51.135, preamble, App. *infra*, p. 108.

debates and committee report, it is hardly surprising that Congress gave wide discretion to the Executive and failed to require evidentiary hearings or to specify other procedural rules for the operation of the program. Congress did not consider that such limitations were constitutionally required in the circumstances in which the bill was enacted; indeed, such fetters would clearly have been inconsistent with the legislative intent and the finding that "[s]wift Executive action is the only effective counterstroke" to the dangers posed (H. Rept. No. 485, 65th Cong., 2d Sess., p. 3). Consequently, when President Wilson invoked the statute he proclaimed that "[n]o citizen of the United States shall receive a passport entitling him to leave or enter the United States, unless it shall *affirmatively appear that there are adequate reasons for such departure or entry* and that such departure or entry is *not prejudicial to the interests of the United States.*"[13] No definition of the "interests of the United States" was provided, nor were passport hearing procedures established.

The statute was amended in 1941 with knowledge of this history and administrative interpretation,[15] and was reenacted in 1952, as amended to permit invocation of the travel restrictions during times of proclaimed national emergency as well as during wartime.[16] This is the statute under which the present system of travel controls operates. In the light of its

[13] Proc. No. 1473, August 8, 1918, Section 1, 40 Stat. 1829, 1831; emphasis added.

[15] See Brief for the Respondent in No. 481, pp. 49–51.

[16] See *id.* at p. 52.

history, and particularly of the 1918 committee report (*supra,* pp. 38–39), the statute must read as giving the Secretary of State "wide discretion and wide authority of action," and as enjoining upon him the duty of preventing the departure and entry of persons "reasonably suspected" of aiding a hostile foreign power, during time of war or proclaimed emergency, even though the "known facts in [a particular] case are not sufficient to warrant the institution of criminal prosecution, and * * * the difficulty of securing legal evidence * * *" makes such prosecution impossible.

As we have noted, Congress in 1918 did not impose limitations of either a substantive or procedural nature upon the exercise of Executive discretion, other than those noted in the Brief for the Respondent in No. 481, at pp. 91–97, nor did it contemplate or require that the Executive impose such limitations upon itself.[15] Nevertheless, the Secretary of State in 1952 adopted the present regulations (App. *infra,* pp. 108–117), setting forth substantive criteria for the exercise of his discretion and procedural protections for the benefit of passport applicants. The regulations (which are discussed in greater detail *infra,* pp. 46 *ff*) establish carefully defined categories of persons to whom passports will be denied on grounds relating to activity,

[15] The latest reenactment of the statute as Section 215 of the Immigration and Nationality Act of 1952, Act of June 27, 1952, c. 477, Title II, c. 2, 66 Stat. 190, was passed before the promulgation, on August 28, 1952, of the regulations here in question (see App. *infra,* pp. 108–117) but did not become effective until December 24, 1952 (66 Stat. 281).

present or potential, on behalf of the Communist movement (22 CFR, 1956 Supp., 51.135); if an applicant cannot be found to come within these categories he will not be denied a passport on grounds related to Communist activity.[16] There are provided procedures for informal hearings, appeal resulting in formal hearings before a board of officers appointed by the Secretary, and a final decision by the Secretary himself (see the regulations, App. *infra*, pp. 110–117). The Secretary's decision under the subsection here involved is made not on mere "suspicion" but upon "reason to believe, on the balance of all the evidence" (22 CFR, 1956 Supp., 51.135 (c); App., *infra*, p. 109); in making or reviewing findings of fact made in the course of processing the application, the fact-finders are to "be convinced by a preponderance of the evidence, as would a trial court in a civil case" (22 CFR, 1956 Supp., 51.141; App. *infra*, p. 111).

These self-imposed restrictions of the Secretary represent a reasoned adaptation of the original congressional will to the present conditions under which the travel controls operate, according more liberal consideration to the rights of individuals, justified by the relatively lessened urgency of the international situation.

2. Against this background, the fundamental issue in the present case comes down to this: whether a statute designed to permit travel controls on the grounds and evidentiary basis contemplated by Congress, as modi-

[16] See *Boudin* v. *Dulles*, 235 F. 2d 532 (C. A. D. C.); *Dayton* v. *Dulles*, 237 F. 2d 43 (C. A. D. C.) (first appeal).

fied and liberalized by the Secretary of State to meet present conditions, is constitutional. In our view, if the Secretary is constitutionally permitted to restrict travel at all, he is permitted to do so for the reasons, in the manner, and on the quantum and kind of evidence here relied upon. For travel controls are justifiable only if they secure a legitimate governmental objective which cannot properly be accomplished in another way. That objective is to prevent the departure and entry of citizens when such departure or entry is reasonably likely to be inimical to the national safety in times of peril. The same objective can be secured by obtaining a conviction based upon criminal activity in aid of a foreign power and placing the person whose movements are to be restrained behind bars—*if* the Government has sufficient evidence of *past* criminal conduct to secure such a conviction, and *if* the evidence is such that it may with safety be revealed to the defendant and to the public at large in open court. If such evidence is in fact available, it is of course the duty of the Government to seek an indictment and conviction.

But where the quantum of proof, though persuasive, does not meet the stringent standards for criminal conviction; or where the evidence may not, consistent with the national interest, be placed in an open record; or where the problem is in the future not the past—it is then that the emergency travel control power, as distinguished from the power to punish for past criminal activity, performs its unique role. It does so by making possible the imposition of restraints upon the individual which, while they may be imposed by the Government under standards less stringent than

those of a criminal prosecution, are at the same time qualitatively far less severe than the restraints which result from a criminal conviction.

On the other hand, to impose substantive and evidentiary standards approaching those of criminal trials upon administrative passport denials resulting in travel control would nullify, as a practical matter, the concept of travel control as a distinct and legitimate power of Government designed to accomplish a limited goal. For this administrative function cannot be performed under the standards applicable to judicial trials. To demand such requirements may not be done without nullifying the statute itself and the congressional will which the statute implements. See also *infra,* pp. 65 *ff.*

This is not to say, of course, that the congressional purpose so clearly expressed complete forecloses this Court, for "[i]n light of the expansion of the concept of substantive due process as a limitation upon all powers of Congress, even the war power * * *" (*Galvan* v. *Press,* 347 U. S. 522, 530), it remains to the Court to determine the validity of the congressional aims and the remedies employed in a particular case. But, as we have pointed out in this Introduction, *supra,* pp. 33 *ff*, the legislative purpose and the situation to be remedied are of singular importance in deciding whether the process accorded to petitioner was that due him under the Constitution, in the light of all the circumstances.[17]

[17] See also our brief in No. 481, at pp. 43–45, 60 *ff.*

II

THERE HAS BEEN NO VIOLATION OF PETITIONER'S RIGHTS OF SUBSTANTIVE DUE PROCESS

We discuss, *first*, the claim that the particular regulation on the basis of which the Secretary denied petitioner a passport is unconstitutionally vague; and, *second*, the argument that the Secretary could not fairly conclude, on the basis of his own findings, that petitioner's case falls within that regulation.

A. THE REGULATION IS NOT UNCONSTITUTIONALLY VAGUE IN PROVIDING FOR THE DENIAL OF PASSPORTS TO PERSONS FOUND TO BE "GOING ABROAD TO ENGAGE IN ACTIVITIES WHICH WILL ADVANCE THE COMMUNIST MOVEMENT FOR THE PURPOSE, KNOWINGLY AND WILFULLY OF ADVANCING THAT MOVEMENT"

Petitioner argues that due process has been denied him "because of the vagueness of the grounds on which the Secretary's decision is based" (Pet. Br. 46, 47–51). That decision states, in the language of Section 51.135 (c) of the regulations (App. *infra*, p. 109), that the Secretary has "reason to believe, on the balance of all the evidence, that [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement"; and, further, that the application is "denied under Section 51.135 (c) * * *, and because the issuance of a passport would be contrary to the national interest" (R. 278, *supra*, p. 22). Petitioner's specific objections are to the words and phrases "Communist movement", "advance", and "contrary to the national interest", which, he argues, are "so hopelessly vague that they cannot satisfy due process requirements" (Pet. Br.

47). We submit that Section 51.135 (c) establishes a clear, meaningful, and valid category of persons to whom passports are to be denied in the exercise of the Secretary's discretion, and that the Secretary's additional statement that the issuance of a passport to petitioner "would be contrary to the national interest" is likewise valid and in no way detracts from the legality of the denial of the application under the grounds specifically set forth in Section 51.135 (c).[18]

1. The contention that the words "Communist movement" are "hopelessly vague" and that they have significantly been left undefined in the Internal Security Act of 1950[19] (Pet. Br. 47, note 22) cannot stand against this Court's own recent statement (*Galvan* v. *Press*, 347 U. S. 522, 529; emphasis added):

> * * * On the basis of extensive investigation Congress made many findings [in the Internal Security Act of 1950], including that in § 2 (1) of the Act that the *"Communist movement* * * * *is* a world-wide revolutionary movement whose purpose it is, by treachery, deceit, infiltration into other groups (governmental and otherwise), espionage, sabotage, terrorism, and any other means deemed necessary to establish a Communist totalitarian dictatorship" * * *

[18] In our brief in No. 481, we show (at pp. 60 *ff*) the basis for denying passports to, and thus restricting the travel of, persons who are directly connected with the Communist movement. That discussion is, of course, directly relevant to the present argument that the Secretary's denial in this case did not violate any of petitioner's rights.

[19] 64 Stat. 987, 50 U. S. C. 781, *et seq.*

The court below, stating that "Congress defined 'the world Communist movement' in several paragraphs of Section 2 of the statute [*i. e.*, the Internal Security Act of 1950]", has likewise quoted this definition. *Communist Party of the United States* v. *Subversive Activities Control Board,* 223 F. 2d 531, 542 (C. A. D. C.), see also 540, reversed on other grounds, 351 U. S. 155. And in *Carlson* v. *Landon,* 342 U. S. 524, 535, note 21, this Court quoted subsection (15) of the same Section 2, which begins with the sentence: "The *Communist movement in the United States is* an organization numbering thousands of adherents, rigidly and ruthlessly disciplined." [Emphasis added.] The balance of the fifteen subsections of Section 2 further define the term to which petitioner objects, define the terms used in the definition, as well as describe and analyze the nature, operations and characteristics of the "Communist movement" and its component parts. Further relevant definitions are set forth in subsections (2)–(5) and (14)–(19) of Section 3 of the Act (50 U. S. C. 782).[20] To say that the term "Communist movement" is "no more meaningful than the epithets 'un-American' or 'subversive propaganda' "[21] (Pet. Br. 47) is to put on blinders against

[20] See also Sections 2, 7 and 10 of the Communist Control Act of 1954, Act of August 24, 1954, c. 886, 68 Stat. 775, 777, 778, 50 U. S. C., Supp. IV, 841, 782 and 792a, for further pertinent references to the "Communist movement".

[21] Petitioner cites *United States* v. *Peck*, 154 F. Supp. 603 (D. D. C.) in support of this proposition. The court there found nothing vague about the phrase "Communist movement"; to the contrary, the court said: "* * * the Communist movement now constitutes a criminal conspiracy * * *" (*id.* at 608). At issue was a Senate resolution authorizing investiga-

the facts of life, the ordinary use of English terms, and congressional definitions recognized by this and other courts.

2. Petitioner plucks the word *"advance"* from the phrase "going abroad to engage in activities which will *advance* the Communist movement, for the purpose, knowingly and wilfully of advancing that movement", and claims that that word, too, is so vague as to invalidate the regulation and the finding. He rests his contention on the fact that other courts in other circumstances have found that questions as to whether a witness was in the past a "sympathizer", a "follower of the Communist line", or a "promoter of Communist interest" were too vague to support criminal indictments *for perjury* (Pet. Br. 47–48). But the demands and limitations of a criminal perjury case are far different from those for administrative regulation, and the criteria for validity vary accordingly. In the present context, the meaning of "advance" is plain, particularly in view of the finding of reason to believe that petitioner is going abroad "knowingly and wilfully" to engage in the proscribed activities. Cf. *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 412–413. Clearly, the term

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tion of "the extent * * * of subversive activities in the United States, * * * including, *but not limited to*, espionage, sabotage, and infiltration by persons * * * under the domination of the foreign government or organizations controlling the world *Communist movement* * * *" (*id.* at 608–609, note 19; emphasis added). In finding this resolution void for vagueness, the court did so precisely because the term "subversive" was *not* limited to the factors enumerated in the "including but not limited to" clause (*id.* at 609).

"advance" means deliberately, intentionally, and purposefully to support, promote, aid, help, and render assistance to the Communist movement.

3. Petitioner's further argument against the Secretary's statement that "issuance of a passport would be contrary to the national interest" is also deficient. Again, the statement must be read in both its immediate and legal contexts. The preamble to Section 51.135, which gives the setting for subsection (c) (the subsection here involved, *supra,* p. 22), states that the purpose of passport denials under the subsections of that regulation is "to promote the *national interest* by assuring that persons who support the world Communist movement * * * may not, through use of United States passports, further the purposes of that movement * * *" (emphasis added). When, as here, a denial results in travel restriction, it is because the statutory restrictions of 8 U. S. C. 1185, which are subject to invocation in time of emergency "[w]hen * * * the President shall find that the *interests of the United States* require * * * ", are now in force under a Presidential Proclamation declaring "that the *interests of the United States* require * * *" the imposition of the statutory controls, in view of the "exigencies of the international situation and the national defense" underlying the existing state of emergency.[22] The relevant "national interest" is thus clearly that of guarding the nation from the internal and external threats posed by the international Com-

[22] Proc. No. 3004, January 17, 1953, 67 Stat. C31; see Brief for the Respondent in No. 481, App., pp. 105–108.

munist movement. As Judge Prettyman stated below (R. 295):

> It is true that the Secretary did not here say in specific terms that he denied the passport because to grant it would be detrimental to internal security or foreign relations. But surely, * * * when the Secretary, having made the finding as to Dayton's purpose, said that issuance of the passport would be contrary to the public interest, he meant the public interest in internal security and in foreign affairs. In the context of the record as it now is, in the light of the finding as to Dayton's purpose, "national interest" clearly means "internal security and foreign affairs". Any difference in meaning between those terms is of no moment here.

This holding is in accord with the decisions of this Court sustaining, as valid against charges of vagueness, standards of "public interest" in various contexts. *New York Central Securities Corp.* v. *United States*, 287 U. S. 12, 24; *United States* v. *Chemical Foundation*, 272 U. S. 1; *Avent* v. *United States*, 266 U. S. 127; *National Broadcasting Co.* v. *United States*, 319 U. S. 190, 225–226.[23] The finding of the Secretary is

[23] In *Avent*, the Court noted that "The statute confines the power of the Commission to emergencies, and the requirement that the rules shall be reasonable and in the interest of the public and of commerce fixes the only standard that is practicable or needed" (266 U. S. at 130). In *New York Central Securities*, the Court held (287 U. S. at 24):

> * * * the criterion is the "public interest". It is a mistaken assumption that this is a mere general reference to public welfare without any standard to guide determinations. The purpose of the Act, the requirements it im-

no more invalid than would be a finding by the Federal Communications Commission denying a broadcasting license on stated grounds, adding that issuance of the license would not be in the "public interest". Cf. *National Broadcasting Co.* v. *United States, supra.*[24].

4. We add that the findings of the Secretary are to be read not only in their external context but as a unitary whole, including the finding of scienter and wilfullness. They are also to be read in the light of the congressional admonition that "the Executive should have wide discretion and wide authority of action" (H. Rept. No. 485, 65th Cong., 2d Sess., p. 3). This is particularly true at a time when Communist affiliation is "screened by ideological patterns and techniques of disguise that make it difficult to identify." *Wieman* v. *Updegraff*, 344 U. S. 183, 188.

Moreover, it must be remembered that these findings relate to present intent and future activities which *may* be engaged in, not to past activities which by their nature are objective facts, either existent or nonexistent. As Professor Jaffe has said, "The facts in

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poses, and the context of the provision in question show the contrary.

[24] We submit that Judge Fahy's dissent, stating that the finding under Section 51.135 (c) "is subsidiary to the basic finding framed in terms of the 'national interest'" (R. 302), clearly inverts the train of decision. It seems plain that the Secretary found that issuance of the passport would be contrary to the "national interest" *because* petitioner came within the provisions of Section 51.135 (c). Moreover, when Judge Fahy says that "in denying this passport, the issuing authority has not focused upon the question whether the grant would be likely to cause harm to national defense" (*ibid.*), he appears to ignore the context of the "national interest" finding.

a particular case as to the citizen's intention are inevitably speculative: all is to be done after the bird has flown".[25] In this "speculative" area the Secretary need not, and cannot, specify particular activities in which he believes petitioner will engage abroad in order to justify his findings as to petitioner's purpose (see Pet. Br. 46).

Nor is the fact that the Secretary's finding is premised upon his "reason to believe, on the balance of all the evidence" subject to valid objection. The House of Lords sustained a lesser standard for decision in a similar context:

> * * * as preventive justice proceeds upon the principle that a person should be restrained from doing something which, if free and unfettered, it is reasonably probable he would do, it must necessarily proceed in all cases, to some extent, on suspicion or anticipation as distinct from proof.[26]

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[25] Jaffe, *The Right to Travel: The Passport Problem*, 35 Foreign Affairs 17, 26–27 (Oct. 1956).

[26] *Rex* v. *Halliday* (*Ex parte Zadig*) [1917], A. C. 260 at 275. The House of Lords was there enforcing an administrative regulation authorizing the Secretary of State, for the duration of World War I, not merely to restrict the travel of British subjects but to place them in detention camps whenever (p. 266) "* * * it appears to the Secretary of State that for securing the public safety or the defence of the realm it is expedient in view of the hostile origin or associations of any person that he shall be * * * interned in such place as may be specified * * *". In a case upholding a similar regular regulation in World War II, Lord Macmillan said (*Liversidge* v. *Anderson*, [1942] A. C. 206, 253):

> * * * I may also quote the words of Lord Finlay, L. C. in *Rex* v. *Halliday:* "It seems obvious that no tribunal for investigating the question whether circumstances of sus-

B. IT WAS NOT ARBITRARY OR CAPRICIOUS FOR THE SECRETARY TO CONCLUDE, ON THE BASIS OF HIS FINDINGS AND THE RECORD, THAT PETITIONER'S CASE CAME WITHIN THE TERMS OF THE REGULATION

Petitioner next argues that the ultimate conclusions just discussed (*supra,* pp. 46–53), assuming their validity as a ground for denial of a passport, are not rationally supported in this case by the factual findings set forth in the Secretary's Decision and Findings (*supra,* pp. 19–23), and are therefore violative of due process (Pet. Br. 52–60).[27] The argument in effect is that the Secretary could not, without being arbitrary or capricious, "have reason to believe, on the balance of all the evidence [as epitomized in the findings], that the applicant is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" (R. 278).[28] We take issue, of course, with this position.

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picion exist warranting some restraint can be imagined less appropriate than a court of law." The question is one of preventive detention justified by reasonable probability, not of criminal conviction which can only be justified by legal evidence.

[27] As to the form of these findings, the Commission on Government Security, in recommending substantive and procedural changes in the administration of the passport program, has stated that "The findings and decision made by the Secretary in the *Dayton* case [*i. e.*, those here in issue] are in exactly the form the Commission contemplated in framing its recommendation". *Report of the Commission on Government Security* (1957), p. 491.

[28] Petitioner's argument on this point closes with a revelation that he has never actually accepted, even for purposes of argument, either the "reason to believe" standard for decision, or travel controls themselves, but instead has treated the problems posed, as he does generally throughout his brief, as if the stand-

1. Petitioner's argument is that even if a "pattern" emerges from the findings and related confidential information set forth in paragraphs Ia–IVa and Ib–IVb (R. 276–277, *supra*, pp. 19–22), and assuming "the truth of these findings and the existence and accuracy of the undisclosed information"[29] (Pet. Br. 53), such a pattern "cannot rationally lead to the conclusion that, in 1956, years later, petitioner's proposed trip to India" was for the purposes found by the Secretary (Pet. Br. 60). This contention is premised upon a misreading of the stated bases for the Secretary's conclusion, which was reached "on the basis of" three elements, not two:—"[1] the foregoing findings [Ia–IVa] together with [2] the confidential information relating thereto [Ib–IVb], *as well as* [3] *other confidential information contained in the files of the Department*

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ards were those of a criminal conviction for past unlawful acts. Thus, he states (Pet. Br. 60) that "No decision of this Court sanctions" "the Government's detention of citizens for preventive purposes rather than as a preliminary to criminal proceedings based upon indictment for past unlawful activities, and on suspicion alone and without evidence of guilt". As we have indicated (*supra*, pp. 42–43, 52–53), we support the intermediate ground between "suspicion" and "proof beyond a reasonable doubt"—*i. e.*, the adequacy, on judicial review under an "arbitrary or capricious" standard, of the Secretary's "reason to believe" that petitioner is going abroad for the proscribed purposes. The question before the Court is whether, in reaching this conclusion, the Secretary "so far violated constitutional prescriptions or specific congressional limitations as to cast his action outside the exceedingly broad boundaries within which he is free to act without judicial review". Prettyman, J., in *Briehl*, R. 181 in No. 481.

[29] There is no substance to petitioner's suggestion elsewhere that the Secretary of State has falsely stated the existence of confidential information—"we cannot, of course, know * * * whether the information referred to even exists" (Pet. Br. 35).

of State, the disclosure of which might prejudice the conduct of United States foreign relations" (R. 278; emphasis added). The substance of this last information—a significant factor wholly ignored by petitioner—has for obvious reasons not been disclosed (see *infra*, pp. 75–77). If the Secretary may lawfully "not disclose [this] information but * * * may act upon it"—as we contend (*infra*, pp. 68–104) and as the court below has held (R. 295)—then it must be assumed that this information is sufficient to overcome whatever hiatus there may possibly be between the findings and information set forth in paragraphs I–IV and the conclusion stated in paragraph V. For, as petitioner himself points out (Pet. Br. 51–52), the Secretary's conclusion must be tested by the bases upon which he relied. If one factor is lawfully taken into account without disclosure, we may not simply ignore it, as petitioner does, but must assume that it fills in apparent deficiencies. Moreover, since this information may not be disclosed for reasons relating to foreign policy as opposed to internal security (compare paragraph VI, R. 278), it would not be unreasonable to assume that the undisclosed information relates more directly to the purpose of petitioner's proposed travel abroad to India—*i. e.*, to the ultimate conclusion—than to the past events encompassed by the prior findings.[30] In these circumstances, the Secre-

[30] It may be suggested that, if the Secretary had information in the foreign-relations area showing that petitioner's proposed travel was for the purposes stated, there was no need for the extensive consideration of petitioner's past; in such a case, the hearing procedures would be irrelevant to the basic ground for denial and would be designed solely to give "the appearance of

tary's conclusion is not subject to attack as arbitrary or capricious.

2. Even assuming, *arguendo,* however, that the existence of undisclosed foreign-affairs-information pertinent to petitioner's travel to India may be ignored, we submit that it would in any event have been permissible for the Secretary to have concluded, on the basis of the evidentiary findings and related confidential information (*i. e.,* Finding I–IV, *supra,* pp. 19–22), considered in the light of the "serious doubts" (R. 278) as to petitioner's general credibility raised by the testimony in the open record, that petitioner wished a passport in order to engage in the type of activities described in the Secretary's conclusion in Finding V (*supra,* p. 22).

The findings on the open record and related confidential information (R. 275–278; *supra,* pp. 19–22) reveal the following activities and associations of petitioner, extending over a considerable period of time:— during 1943 and 1944, chairmanship and active direction of a committee indicated to have been conceived and organized by Communist Party officials as a front for propaganda and espionage activities, and association therein with Frank and Sandra Collins and Rose Segure, all of whom were instrumental in or-

legal procedure" (*Jay* v. *Boyd*, 351 U. S. 345, 372, Mr. Justice Frankfurter, dissenting). But in view of the Secretary's Decision and Findings, it would appear that the information undisclosed for reasons relating to foreign affairs must have been information which would be significant in relation to petitioner's travel only if there were reason to believe that petitioner had been engaged in Communist activity in the past.

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ganizing the committee and all of whom were indicated to have been Communist Party members at the time; from 1946 to 1950, close association—including the sharing of his house for eight months—with Alfred Sarant, an active Communist Party member (and, as to 1943 and 1944, an admitted one), who was involved in the espionage apparatus of Julius Rosenberg, and who entered Mexico with petitioner's wife a week after the Federal Bureau of Investigation first subjected him to intensive interrogation; during 1949 and 1950, presence on more than one occasion in the apartment building at 65 Morton Street in which Sarant leased an apartment which was indicated to have been used by Rosenberg and other members of his spy ring for the microfilming of classified documents ultimately transmitted to a foreign power; and, finally, a close relationship since 1938 with Bernard Peters, the man responsible for petitioner's offer of employment in India and with whom petitioner, as a primary stated purpose of his proposed travel abroad, hopes to work in close collaboration, and a man indicated to have held Communist Party membership, to have engaged in numerous Communist activities in this country and abroad, and to be suspected of being a Communist espionage agent.

It is not unreasonable, we submit, to infer that these activities and associations are not the wholly unrelated and innocent facts which petitioner contends they are, but instead are linked by the common thread of petitioner's close connection with the Communist movement.

Coupled with this history of petitioner's past, as shown by the material before the Secretary (open and

closed), were the "serious doubts" as to petitioner's general credibility arising from his denial of a possibly incriminating fact in the face of contrary testimony, which gave impetus to the adverse inferences to be drawn from the foregoing combination of events. From the very beginning of the processing of petitioner's passport application, it was evident that "the determining factor in the case" was petitioner's "association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at" 65 Morton Street, the purported locale of microfilming activities of that ring (R. 44; see *supra*, p. 4). The importance of these allegations in the Department's deliberations in this case is emphasized by the exhaustive hearings held on the issue (R. 103–144, 167–270). Petitioner has, as he points out (Pet. Br. 55–56), staunchly and emphatically denied that he was ever near 65 Morton Street until taken there by FBI agents; petitioner would undoubtedly be the first to deny any possibility that he might be "mistaken" in these disavowals. It may therefore be assumed that petitioner's testimony in this regard is either absolutely true or absolutely false. On the other hand, three witnesses at the hearing positively identified petitioner under extensive cross-examination by petitioner's counsel, as having been present at 65 Morton Street.[31] Petitioner suggests no reason or motive which would cause these apparently disinterested witnesses deliberately to falsify their testimony under oath; he suggests instead that their testimony is "in-

[31] This testimony is further discussed *infra* at pp. 61–62.

credible" (Pet. Br. 56–58, note 26) and thus, apparently, mistaken.

Conceivably, the Secretary could have believed petitioner and thus treated all three apparently disinterested witnesses as "mistaken". But in believing the witnesses, the Secretary not only concluded the disputed fact issue—presence at 65 Morton Street—adversely to petitioner, but was further warranted in inferring that petitioner's testimony under oath was absolutely false on this material issue. Moreover, the disputed fact, while not *per se* incriminating (as petitioner so carefully points out (Pet. Br. 55–56)), was one which could readily form a link in a chain of evidence incriminating under the espionage laws.

Having concluded that petitioner testified falsely in this matter, it was not necessary for the Secretary to go further and to make specific findings as to petitioner's nefarious purposes or specific knowledge in relation to 65 Morton Street and espionage activities there, as petitioner suggests (*ibid.*). For this falsification was manifestly sufficient to give the Secretary, as he stated it did, "serious doubts as to [petitioner's] general credibility * * *" (R. 278); to cast doubt upon petitioner's protestations of innocence with regard to his other activities and associations; to strengthen the adverse conclusions inferable from the composite of those activities and associations; and to support an inference that, if petitioner would falsify his testimony in this important matter during the consideration of his passport application, he would use the passport in furtherance of Communist activities.

Taking all these considerations together, we submit that the Secretary's findings afford ample support for "reason to believe, on the balance of all the evidence," that petitioner was going to India for the illegitimate purposes stated by the Secretary.

3. Petitioner's contentions as to the inadequacy of the Secretary's findings are based in part upon the assertion that the testimony of the three Elwyns, the witnesses called to testify to petitioner's presence at 65 Morton Street (*supra*, pp. 13–17), is "incredible" and therefore furnishes no basis for the finding (R. 277) that petitioner was in fact at 65 Morton Street.[32] We submit that, on the contrary, this testimony is entirely credible. The record shows that, within eight months after the alleged furniture-moving incident (see *supra*, pp. 15–17), all three of these witnesses had identified petitioner as having been at 65 Morton Street. Prior to that time, at least one of the witnesses had made a photo identification of petitioner. Some five years later, at the formal hearing, these same witnesses repeated their identifications under oath and in petitioner's presence. It is true, as petitioner argues (though not to the degree he asserts), that the testimony at the hearing showed some confusion as to dates. But this is readily attributable to the passage of time, which is more apt to erode recollection of the date when an incident took place than of the details of the incident itself. And, as to the details of the various alleged encounters with petitioner at 65 Morton Street, the testimony was positive and pre-

[32] This is the only finding based upon the open record which petitioner contends is unsupported by that record.

cise and withstood the assaults of cross-examination. The testimony of these three disinterested witnesses almost compels the conclusion that petitioner had in fact been present at 65 Morton Street.

4. Petitioner's argument that "the Secretary's decision constitutes a judgment of guilt by association", because it is based upon petitioner's "innocent association with persons whose activities the Secretary finds culpable" (Pet. Br. 61), is quite unwarranted. First, there is more than mere "association" here; petitioner has been found to have been "*active* in" and "*Chairman* of" an organization indicated to have been "conceived and organized by Communist Party officials as a front for propaganda and espionage activities" (R. 276 *supra*, pp. 19–20; emphasis added). Secondly, in passing upon the propriety of considering "associations" in determining present character, this Court has said that "[o]ne's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps". *Adler* v. *Board of Education*, 342 U. S. 485, 493; cf. *American Communications Ass'n* v. *Douds*, 339 U. S. 382, 391–392. Such associations have the same relevancy in a prediction of possible future conduct based upon an estimate of present intent.

We may concede, as petitioner urges, that "an official finding of vicarious *guilt* is impermissible", and that "'*guilt* is personal * * *'" (Pet. Br. 61; emphasis added), without agreeing that this principle vitiates the findings and conclusions in this case.

For the Secretary has not found petitioner "guilty" of anything, in the proper meaning of that term. In deciding passport applications, the Secretary does not sit as judge or jury to determine the truth or falsity of questions relating to past acts or past unlawful conduct. His sole function under the regulation is to make a reasoned judgment as to the likelihood that petitioner will deliberately engage in the future in proscribed activities abroad. There is no valid basis for restricting, in the manner suggested by petitioner, the indicia which the Secretary may take into account in making that judgment, as if this proceeding were a criminal trial of guilt or innocence. The Secretary must make a reasoned forecast of the applicant's conduct abroad, not a finding of his past derelictions. *Supra*, pp. 43–45, 52–53.

More important, perhaps, is the fact that petitioner's argument is posited upon the assumption that the Secretary must either accept at face value petitioner's protestations of innocence as to each separate allegation or must render separate findings that petitioner has knowingly participated in unlawful activity as to each such allegation; it is not sufficient, petitioner suggests, for the Secretary to have reason to believe, on the basis of *all* the evidence, that petitioner *is going abroad* for the purposes indicated. The suggestion appears to be that the Secretary must be able to support each and every individual piece of information which goes into the making of his present estimate by a preponderance of evidence. This, we submit, is not only a novel and unprecedented view of the stand-

ards of decision applicable to an administrator—or to any fact-finder—passing upon an application, but would obviously be a totally impracticable and unworkable requirement in the particular field of passport issuance in a time of national emergency proclaimed by the President.

We do not contend that, on the basis of the findings and the record before this Court—excluding the information relating to foreign relations—the Secretary could have reached *only* the conclusion he did reach. We do not argue that it is beyond the realm of possibility that petitioner is in fact what he claims to be:—a person entrapped by an unfortunate chain of circumstance coupled with mistaken identity or perjury; by an unfortunate but innocent penchant for associating with persons considered by Government officials to be involved in Communist activity and espionage; and by his misfortune in having headed an organization deemed by these officials to have been organized for purposes of Communist propaganda and espionage. But there is certainly the other alternative—and, we submit, a very grave one:—that petitioner is a person who has been, and very likely will again become, if given the opportunity, deeply involved in Communist activity, possibly including espionage. The choice between petitioner's version and a finding of reasonable grounds to believe that petitioner was going to India for illegitimate purposes was for the Secretary of State to make. What we do contend is that the record and findings justify as reasonable the choice made, and render the Secretary's

determination immune from reversal on the ground that it was arbitrary or capricious.

III

THERE HAS BEEN NO VIOLATION OF PETITIONER'S RIGHTS OF PROCEDURAL DUE PROCESS

We now turn to the issue of whether the administrative use of undisclosed information afforded petitioner due process. First, we show that such use of confidential information as has been made did not unduly prejudice petitioner's opportunity to establish his entitlement to a passport. In the next section (*infra,* pp. 68–104), we show that the use of such information was justified.

A. PETITIONER WAS NOT UNDULY PREJUDICED BY THE USE OF CONFIDENTIAL INFORMATION

The Statement, *supra,* pp. 3–18, outlines at some length the proceedings accorded petitioner in the Department of State. This recital indicates the ample opportunity afforded him to know the grounds on which the denial of his application was based—with the exception of information undisclosed because to do so might prejudice foreign relations (*supra,* pp. 55–57, and *infra,* pp. 75–77)—and to attempt to explain or refute the facts underlying those grounds. Some of the salient conclusions compelled by that review are as follows:

It is clear that petitioner was fully aware of the general nature of the derogatory information upon which the tentative denial by the Passport Office was based, well in advance of the hearings before the

Board of Passport Appeals. Thus, in his affidavit of June 14, 1954, petitioner stated his understanding that the tentative denial was based upon his associations with the Science for Victory Committee, Alfred Sarant, and Bernard Peters (R. 11). The affidavit recognized and dealt with in detail the very incidents and associations in petitioner's past upon which the Secretary's factual findings were ultimately based (R. 10–42). That petitioner was correct in his view of what aspects of his past were considered pertinent was confirmed by the Department's letter of December 1, 1954 (R. 48, 49). This letter set forth further particulars with respect to the apartment incident and named nine individuals, including Peters, Sarant, the Collinses and Rose Segure, with whom petitioner was allegedly associated and concerning whom the Department's file contained derogatory information (R. 49). A comparison of this letter with the findings of the Secretary (*supra*, pp. 19–22) reveals the essential identity of the "charges" and the findings (R. 276–277). Moreover, petitioner's testimony throughout the first hearing again demonstrated his grasp not only of the nature but of many of the details of the security information available to the Department. Cf. *National Labor Relations Board* v. *Mackay Co.*, 304 U. S. 333; *Moog Industries* v. *Federal Trade Comm'n*, 238 F. 2d 43 (C. A. 8); *Bailey* v. *Richardson*, 182 F. 2d 46, 58 (C. A. D. C.), affirmed by an equally divided court, 341 U. S. 918.

Petitioner was thus aware, at an early stage in the proceedings, of virtually all of the information available to the Department of State and relating to peti-

tioner's past which he could best hope to refute, *i. e.*, his own past activities and associations with named individuals and a specified organization—as contrasted with the sources and details of information relating to the nature or character of the persons and organizations with whom petitioner had associated. With but two exceptions, petitioner made no attempt to deny his alleged activities and associations, but instead testified at length to the insignificance of some and to his lack of knowledge of any connection between these activities and associations and the Communist movement or espionage—thus demonstrating his understanding of the nature of the derogatory information as to these activities and associations. With respect to the two exceptions—petitioner's denial that he had ever been at 65 Morton Street and that he had any recollection of having met William Perl—the Department procured the voluntary appearance of three disinterested witnesses whose testimony was in direct contradiction to that of petitioner. All three testified that they had seen petitioner at 65 Morton Street, and two of the witnesses testified that they had seen petitioner and Perl in each other's company.[33] This testimony was given in the presence of petitioner and his attorney, and was subjected to vigorous cross-examination. Petitioner had full opportunity to call any witnesses he desired.

The Secretary thus received for review and decision, in addition to the classified information in the departmental file, a public record which showed that

[33] The Secretary made no finding, however, based upon petitioner's alleged relationship with Perl.

petitioner had received fair notice of the general information against him (the sources and details of which were withheld for security reasons), and an opportunity to counter that information to the best of his ability; that he admitted most of the primary facts of association and activity; and that as to those he denied he had been confronted with and contradicted by disinterested witnesses. In short, petitioner's presentation of his own case was not unduly hampered by the use of undisclosed information; rather, he was in a good position to disprove the allegations which related to himself; and he was made aware of the general nature of the charges against the others with whom he was linked.

B. THE WITHHOLDING OF THE SOURCES AND DETAILS OF CERTAIN INFORMATION WAS JUSTIFIED BY THE CONSIDERATIONS RECITED BY THE SECRETARY AND DID NOT VIOLATE DUE PROCESS

The court below has ruled that, on the basis of the reasons advanced by the Secretary of State for the nondisclosure of confidential information relating to the denial of petitioner's application, the Secretary "need not disclose the information but he may act upon it" (R. 295).[34] Petitioner challenges this ruling and the validity of the regulations permitting the limited withholding of information where security considerations require (Pet. Br. 21–43; see also the

[34] In the *Briehl* case, No. 481, the four judges who reached this issue, including the two judges in the majority below, ruled that the Secretary could validly take into account confidential information in passing upon passport applications (see R. 195–198).

Brief for *Amici*, pp. 10–32).[35] We submit that, on the contrary, the holding of both courts below on this issue must be sustained.

1. *The nature of the conflicting interests.*—The conflicting interests which must be considered in determing the requirements of procedural due process in

[35] The important provisions under attack in this connection are Sections 51.137, 51.162, 51.163 and 51.170 (App. *infra*, pp. 110, 115–117). These sections contain the following provisions (emphasis added):—Section 51.137 provides that an applicant whose application is tentatively denied shall be notified "of the reasons on which [the denial] is based, as specifically as in the judgment of the Department of State *security considerations* permit," with a similar provision in the event of a final denial by the Passport Office. Section 51.162 permits an applicant petitioning to the Board of Passport Appeals to "address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case", which request is to be passed on by the Board "[i]n conformity with the relevant laws and regulations", the Board taking "whatever action it deems necessary to insure the applicant of a full and fair consideration of his case". Section 51.163 provides that "[t]he Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility", but such files, other than papers submitted by the applicant, may not be examined by the applicant. That section further provides that the hearing before the Board is to be conducted "in such manner as to protect from disclosure *information affecting the national security or tending to disclose or compromise investigative sources or methods*". Section 51.170 provides that "[i]n determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and *such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the credibility of confidential informants*". (Emphasis added.)

this case lie on several levels. For the reasons given in our brief in No. 481, we believe that the first level of conflict must be resolved in favor of the Government—that the interest of the individual citizen in unrestricted freedom of travel must yield to the needs of the body politic in times of war or emergency, and that the Government may maintain a system of travel control, so long as that system embodies the essentials of due process of law.

The second level of conflict concerns the application of the travel control system once it has been established; and here the opposition is again between the individual, on the one hand, and the Government, as representative of the Nation, on the other—the individual has an interest in being informed of the source, content, and details of all information upon which the Government proposes to base a restriction of his travel, in order that he may explain or refute such information; the Government, at the same time, has an interest in protecting from disclosure information which cannot be revealed without adversely affecting the national security and the conduct of foreign relations. With regard to the conflict at this level, "no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense". *Roviaro* v. *United States*, 353 U. S. 53, 62.

Petitioner contends that, in this balancing, his own interest in and right to full disclosure in the face of a

threatened passport denial are absolute.[36] If the conflict must be resolved at this level, petitioner asserts that the interest of the Nation must give way to his own interest, and full disclosure is required, despite the serious consequences which the Secretary states would flow from such disclosure (Pet. Br. 23–33).

Recognizing, however, that the Secretary's statement of reasons for non-disclosure may not lightly be brushed aside, petitioner suggests that this head-on clash of individual and national interests need not be resolved at all. The suggested solution is implied in the statement that "No one suggests that the Secretary be forced to open any of his files" (Pet. Br. 34); the feared detriment of disclosure may be avoided by the simple expedient of issuing petitioner a passport; the Secretary's information will be protected, and petitioner will cease to have cause for complaint. The effect of this "solution" is, of course, to create a new conflict, compelling the Secretary to resolve the clash of two national interests to the inevitable destruction of one of them; petitioner would force the Secretary to choose between preservation of the Government's intelligence system and certain aspects of its foreign relations, on the one hand, and the maintenance of the travel control system, enjoined by Congress, on the other.

We submit that resolving the problem in this way is no solution at all; one or another of the Government's major interests would necessarily have to be

[36] We have indicated, *supra*, pp. 37–41, 44–45, that a travel control system which must operate on the evidentiary and procedural standards of a criminal trial is illusory and serves no valid purpose.

sacrificed, and no interest of the individual would be affected in any way. Petitioner's solution, in short, is once again to maintain the absolute supremacy of the applicant's right to full disclosure of all the information used against him, no matter what the consequences. This absolute conclusion is the one to which this country normally adheres in criminal trials because of the nature of the proceeding and of the sanction, but it has not been applied in other areas, where the interests in non-disclosure are strong and outweigh the individual's interest in full disclosure. An appropriate accommodation is essential.

The nature of this conflict, and the necessary result of petitioner's position, were well expressed in *Liversidge* v. *Anderson* [1942] A. C. 206, 253–254. In that case, the House of Lords flatly rejected petitioner's view that the interest of the individual in full disclosure is so inviolate that, in deference to it, a cabinet officer may be compelled in time of crisis to act in derogation of a vital national interest. That was a suit for damages for false imprisonment based upon the detention of the plaintiff under a World War II administrative regulation.[37] The plaintiff's arguments

[37] The regulation provided that "If the Secretary of State has reasonable cause to believe any person to be of hostile origin or associations or to have been recently concerned in acts prejudicial to the public safety or the defense of the realm * * * and that by reason thereof it is necessary to exercise control over him, he may make an order against that person directing that he be detained". The House of Lords held in *Liversidge* that the Secretary need not reveal the grounds for his "reasonable cause to believe". See also *Greene* v. *Home Secretary* [1942] A. C. 284; *Rex* v. *Home Secretary* (*Ex parte Budd*) [1942] 2 K. B. 14.

against the use of confidential information would have required the Secretary to choose between release of the plaintiff and disclosure of the information. Lord Macmillan said:

> As Lord Parker said in *The Zamora:* "Those who are responsible for the national security must be the sole judges of what the national security requires. It would be obviously undesirable that such matters should be made the subject of evidence in a court of law or otherwise discussed in public." * * *
>
> As I have indicated, a court of law manifestly could not pronounce on the reasonableness of the Secretary of State's cause of belief [on which detention was based] unless it were able to place itself in the position of the Secretary of State and were put in possession of all the knowledge both of facts and of policy which he had. But the public interest must, by the nature of things, frequently preclude the Secretary of State from disclosing to a court or to anyone else the facts and reasons which have actuated him. What is to happen then? The appellant says that the court is entitled and has a duty to examine the grounds of the Secretary of State's belief. But the court is also bound to accept a statement by the Secretary of State that he cannot consistently with the public interest divulge these grounds. Here is indeed an impasse. The appellant's solution has the merit of courage, not to say audacity. He says that where the Secretary of State, by declining to disclose his information, has failed, through no fault of his own to justify the detention, he must be held confessed of having

> falsely imprisoned the detained person and must be mulcted in damages. It will naturally be in the most dangerous cases, where detention is most essential to the public safety, that the information before the Secretary of State is most likely to be of a confidential character, precluding its disclosure. Yet the court is to be constrained where detention is most justifiable to find the detention unjustified. I decline to accept an interpretation of the regulation which leads to so fantastic a result.

It is worthy of note that, in the present case, the choice offered by petitioner would require, as the price of withholding security information, not merely that petitioner be released from all travel restriction. It would require, in addition, that the Secretary of State affirmatively confer his official sanction, in the form of a passport, upon the travel of one who, he has reason to believe, is going abroad to further the aims of those who seek to undermine our national integrity.

2. *The Secretary has stated adequate reasons for withholding information relating to foreign relations, and the sources and details of information relating to internal security.*—In assessing the conflict between national and individual interests, we consider first the validity of the reasons stated by the Secretary for withholding the substance, sources, and details of information in this case. At the outset, we note the important fact that the information has been reviewed by the Secretary of State himself, and that it is he who has attested to the reasons for nondis-

closure.[38] Thus "the protection implicit in the office of the functionary whose conduct is challenged" (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 163, Mr. Justice Frankfurter, concurring) lends weight both to the presumption that disclosure would in fact lead to grave detriment, and likewise to the presumption that petitioner's conflicting interests have been carefully considered in restricting his right to travel on the basis of undisclosed information.[39]

(*a*). *Foreign relations information*:—Turning first to the withholding of "confidential information contained in the files of the Department of State, the disclosure of which might prejudice the conduct of United States foreign relations" (R. 278, paragraph V, *supra*, p. 22), there can be no doubt of the Secretary's prerogative to withhold such information from petitioner, the public, and the courts, on the ground that "to disclose publicly" such information

[38] In *Jay* v. *Boyd*, 351 U. S. 345, 358, note 22, the Court noted that a special inquiry officer (not the Attorney General) had "found that the disclosure of the information would have been contrary to public interest, safety or security. We accept that finding. Nothing more is required by the regulation".

[39] The Association of the Bar of the City of New York recommends that the need for non-disclosure in security matters be certified by the head of an agency. *The Federal Loyalty-Security Program* (1956), 174. The Commission on Government Security similarly recommends that in certain loyalty proceedings no confrontation of regular informants be required if the "head of the investigative agency determines that the disclosure of the identity of such informants will prejudice the national security". See *Report* at, *e. g.*, 66–67, 141, 225. See also Mankiewicz, Mangum and Moody, *The Federal Loyalty-Security Program: A Proposed Statute*, 44 Calif. L. Rev. 72, 84.

"might * * * prejudice the interest of United States foreign relations" (R. 278, paragraph VI, *supra*, p. 23). Moreover, as we shall show, the Secretary may act upon such information without disclosing it (*infra*, pp. 86-102).

Petitioner himself, while pointing out that the Secretary has not indicated the substance of this information[40] (Pet. Br. 22), makes no serious objection to the adequacy of the Secretary's statement as furnishing grounds for refusing to disclose the information. *Amici*, however, assert that since the Secretary fails to state "[*h*]*ow* the disclosure * * * might prejudice our foreign relations" and therefore "requires too much conjecture", his statement must be given little or no weight (Brief for *Amici*, p. 17; emphasis in the original). This is indeed an extraordinary statement with respect to the "very delicate" nature of foreign relations,[41] of which the Secretary of State is of course the judge. Obviously, in countless instances, the revelation of *how* a disclosure might prejudice international relations (or indeed any other interest) would frequently be tantamount to a disclosure of the information itself, or of some other vital matter, and could lead to

[40] The implication by *amici* (Brief for *Amici*, p. 3, note 1) that the Government misled the court below into a belief that the substance of this particular information had been disclosed to petitioner is unwarranted. In the Brief for Appellee (the Secretary) below, it was expressly stated that "the Secretary's decision includes * * * a summary of all the confidential information relied on, *other than that relating to the conduct of foreign affairs*" (Brief in C. A. D. C., No. 13717, p. 39, note 32; emphasis added).

[41] *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 320.

the same detrimental results. This Court said in *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 321:

> The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is *requested* to furnish the information "if not incompatible with the public interest". A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

Even in a case in which prejudice to foreign relations was not the stated basis for non-disclosure of information, the Court has ruled that, where the use of confidential information is permissible, "the requirement of a decision containing 'reasons' is fully complied with by a statement to the effect that the application has been denied on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety or security". *Jay* v. *Boyd*, 351 U. S. 345, 360. Here, the Secretary's statement of his reasons more than meets this test.

(*b*). *Internal security information.*—The same is true of the Secretary's statement of reasons for non-disclosure of the source and details of the information set forth in paragraphs Ib–IVb of the findings, *supra*,

pp. 19–22 (R. 276–277). As to this information, the Secretary has said (Paragraph VI, R. 278):

> The confidential information referred to in paragraphs I (b), II (b), III (b) and IV (b) above relates to the internal security of the United States. The substance of this confidential information was disclosed to the applicant during the consideration of his passport application. To disclose publicly the sources and details of this information would, in my judgment, be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security. Moreover, it would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area * * *.

This is surely a most comprehensive statement of reasons for non-disclosure.[42] Cf. *United States* v. *Reynolds*, 345 U. S. 1, 4–5. The considerations recited, from the Secretary of State himself, would seem to be weighty indeed. This Court has only recently said (*Jencks* v. *United States*, 353 U. S. 657, 670):

> It is unquestionably true that the protection of vital national interests may militate against public disclosure of documents in the Govern-

[42] Compare *Jay* v. *Boyd*, *supra*, where the Court said of the far more general reason of prejudice "to the public interest, safety, or security": "If the statue permits any withholding of information from the alien, manifestly this is a reasonable class of cases in which to exercise that power." 351 U. S. at 358.

ment's possession. This has been recognized in decisions of this Court in civil causes * * *.

In the *Reynolds* case, *supra*, the Court (at p. 7) cited *Duncan* v. *Cammell, Laird & Co.*, [1942] A. C. 624, as reviewing "[m]ost of the English precedents" in this field. That case—significantly, a civil action in the ordinary courts—arose out of the sinking of the submarine *Thetis*. Discovery was sought of the plans and construction contracts of the submarine. The House of Lords held that discovery could not be obtained. "The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld". [1942] A. C. at 636. And the sole arbiter of when the public interest so requires is the cabinet minister who heads the department to which the documents belong. Although the action was between private parties, the Law Lords held that no distinction was to be made for suits against the Government, and in fact stated that when the Crown is a party it may not be required to give discovery at all. [1942] A. C. at 632.[43]

The House looked carefully into the question whether the departmental determination should be conclusive. The judgment of the Lord Chancellor

[43] "The importance of *Duncan* v. *Cammell, Laird & Co.* * * * is marked by the fact that seven members of the House of Lords sat to hear the appeal. Moreover, the unusual course was followed of delivering only a single judgment which was prepared by the Lord Chancellor after 'consultation with and contribution from' the other learned Lords". 58 L. Q. Rev. 436. The decision disapproves the decision of the Judicial Committee of the Privy Council in *Robinson* v. *State of South Australia*, [1931] A. C. 704.

(Viscount Simon), speaking for all the Law Lords, said ([1942] A. C. 624, 638):

> The essential matter is that the decision to object should be taken by the minister who is the political head of the department, and that he should have seen and considered the contents of the documents and himself have formed the view that on grounds of public interest they ought not to be produced, either because of their actual contents or because of the class of documents, *e. g.*, departmental minutes, to which they belong.

And, after reviewing the cases, and quoting among others the statement of Lord Kinnear in *Admiralty Commissioners* v. *Aberdeen Steam Trawling & Fishing Co.*, [1909] Sess. Cas. 335—"A department of Government to which the exigencies of the public service are known as they connot be known to the Court, must, in my judgment, determine a question of this kind for itself * * *"—the Lord Chancellor declares that the executive determination of privilege is conclusive on the court.

The Lord Chancellor then goes on to lay down standards on which the minister should base his executive determination, mentioning, among others, situations where "disclosure would be injurious to national defence * * * or where the practice of keeping a class of documents secret is necessary for the proper functioning of the public service." [1942] A. C. at 642. These are the factors on which the Secretary made his determination in this case. See R. 278, *supra*, pp. 22–23. The Lord's final conclusion was that:

> When these conditions are satisfied and the minister feels it is his duty to deny access to material which would otherwise be available, there is no question but that the public interest must be preferred to any private consideration. * * * After all, the public interest is also the interest of every subject of the realm, and while, in these exceptional cases, the private citizen may seem to be denied what is to his immediate advantage, he, like the rest of us, would suffer if the needs of protecting the interests of the country as a whole were not ranked as a prior obligation.

Petitioner nevertheless says that "the prejudice which the Government claims will flow from disclosure is, to say the least, fanciful" (Pet. Br. 35); *amici* similarly launch a full-scale attempt to demonstrate that no damage to the national interest would in fact be caused by "compromising investigative sources and methods", by "seriously interfering with the ability of [the State] Department and the Executive Branch to obtain reliable information affecting our internal security", by adversely affecting "our ability to obtain and utilize information from sources abroad", and by interfering "with our established relationships in the security and intelligence area". To the contrary, petitioner suggests that nothing but beneficial results would flow from these effects of disclosure (Pet. Br. 35)."

"The entire argument of *amici* on this issue (Brief for *Amici*, pp. 16-24) is irrelevant, since it is based *in toto* upon the erroneous premise that "nowhere does the Secretary state that the particular confidential information undisclosed to petitioner in the present case 'affects the national security'" (*id.* at

The prejudice from disclosure envisaged by the Secretary is not "fanciful", nor are the vital national interests involved in maintaining investigative sources and methods, as well as security and intelligence relationships, to be dismissed as trivial. It goes without saying that this Government could not long survive in its present constitutional form if it did not keep itself constantly supplied with information which "relates to the internal security of the United States". The question here is whether the necessary means of obtaining this information would be so dangerously impaired by the disclosure of sources and details of the information obtained through such means that the information itself would no longer be forthcoming. We submit that such would be the case, and that as a result the Court must defer to the reasons for non-disclosure cited by the Secretary of State.

This question has been most frequently debated in the context of the Government's employee security and loyalty programs, in which reports of the Federal Bureau of Investigation have been the primary sources of confidential information. We may assume that the bulk of the security information relied upon by the Secretary was likewise from FBI reports. A chairman of the former Loyalty Review Board has explained the need for non-disclosure as follows (Rich-

22), and that as a result "[w]e are left * * * with the protection of sources and investigative methods [impliedly unrelated to national security] as the sole understandable reason assigned" for non-disclosure (*id.* at 17). But paragraph VI of the Decision and Findings begins with this sentence (R. 278; emphasis added): "*The confidential information referred to * * * relates to the internal security of the United States.*" *Supra*, p. 23.

ardson, *The Federal Employee Loyalty Program*, 51 Col. L. Rev. 546, 549–550):

> * * * the role of the FBI report must be appreciated. In the overwhelming majority of cases, the record, without the FBI report, would not contain important material information with respect to derogatory items concerning the particular employee. The long and varied experience of the FBI is to the effect that its investigative reports should include statements from confidential sources. Of necessity, these sources are of varied natures. The FBI has many agents operating secretly for the purpose of ferreting out facts to aid the President. The disclosure of their identity, of circumstances indicative of identity, would not only completely destroy their usefulness but in many cases subject them to serious physical danger. Other confidential informants are members of the public who will give information to the FBI only under a strict seal of confidence, their reasons being the obvious ones of the ordinary citizen who refuses to get involved in a public controversy. A further source might be fellow employees or business associates who, unless given complete anonymity, would not under any circumstances disclose their knowledge to the FBI. Numerous comparable informants might be referred to, and in the overwhelming majority of cases, the material facts with reference to derogatory items come from such confidential sources.
>
> As a result, the FBI rigorously observes its promises of confidence and will not disclose to anyone these evidential sources. * * * It is not an answer to suggest that the confidential re-

> ports made by the FBI should be used only as a lead to actual first-hand evidence. The very nature of such confidential information implies that, since the persons would speak to the FBI only in confidence, personal testimony could not be secured even if the Board had the power to require it.

See also Hoover, *A Comment On the Article "Loyalty Among Government Employees,"* 58 Yale L. J. 401, 409–410; *Hearings Before the Subcommittee of the House Appropriations Committee on Department of Justice Appropriation Bill for 1949,* 80th Cong., 2d Sess., pp. 245–247.

In the particular context of this particular case, these reasons are especially compelling. The information as to the Science for Victory Committee, Bernard Peters, Alfred Sarant, and the apartment at 65 Morton Street does not relate to matters of relatively minor significance in the hierarchy of internal security considerations; it relates to possible espionage on behalf of an adverse foreign power.

It is well to note, in addition, that confidential informants supply information, obtainable in no other way, which may result in a decision favorable instead of adverse to a passport applicant. Mr. Richardson referred to "members of the public who will give information to the FBI only under a strict seal of confidence" (*supra,* p. 83). Such a person—a friend, neighbor, or co-worker—though at times the source of

derogatory information, often is able to furnish information tending to dispel adverse inferences furnished by sources less well acquainted with the subject. Whether his information be favorable or adverse, however, it is seldom available at all except under an assurance of strictest confidence. If such assurance is breached by disclosure, or if no such assurance may safely be given, this whole source of information necessarily evaporates. Nor is it any answer to say that if the information is of sufficient importance a patriotic citizen would be willing to have its source disclosed and to testify to it, since the individual informant, having only a fragmentary view of an over-all situation, might be totally unaware of the value of the information which he declines to discuss.

We are, of course, not unmindful that the legitimate governmental interests to which we have referred have at times been held up as a shield to justify abusive and oppressive exercises of power, not only abroad but in this country as well. But such abuses of lawful powers do not destroy the powers themselves. The procedures here established and applied by the Secretary of State, in carrying out a program required by Congress, show no such abuse. The words of Mr. Justice Frankfurter, concurring in the recent case of *In re Groban*, 352 U. S. 330, 335–336, are pertinent:

> To whatever extent history may confirm Lord Acton's dictum that power tends to corrupt,

> such a doctrine of fear can hardly serve as a test, under the Due Process Clause * * *, of a particular exercise of * * * legislative power. And so, the constitutionality of a particular statute, expressive of a State's view of a desirable policy for dealing with one of the rudimentary concerns of society * * * and directed toward a particular situation, cannot be determined by deriving a troupe of hobgoblins from the assumption that such a particularized exercise of power would justify an unlimited, abusive exercise of power.

3. *Petitioner's interests do not constitutionally require that the Secretary of State ignore the undisclosed information in passing upon petitioner's passport application.*—From what we have said, we think it plain that the national interest in non-disclosure of information pertaining to foreign relations and internal security is a vital one, particularly in times such as these. Moreover, we believe that Congress may, in such times, authorize the use of such information in the operation of a travel control program, as it has here.

(a) As already indicated (*supra*, pp. 54–55, note 28), petitioner's claim to an inviolate constitutional right to full disclosure is essentially an assertion of an absolute right conferred in terms only upon defendants in criminal actions under the Sixth Amendment: the right to confrontation of *all* witnesses against him. *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U. S. 123, 174, 180, concurring opinion of Mr. Justice Douglas; cf. *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, 337–338; *Hepner* v. *United States*, 213

U. S. 103; *United States* v. *Zucker*, 161 U. S. 475.[45] As the court below has pointed out (R. 296–300; see also No. 481, R. 195–198), in non-criminal proceedings this Court has permitted the Government to act upon the basis of undisclosed information, where the reasons for nondisclosure are sufficiently weighty.

The most striking parallel is the decision in *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U. S. 103. That case involved the right to do business abroad—the right to operate an air route into foreign countries. The company had a "right" to engage in such business, as an aspect of "liberty" protected by the Fifth Amendment. The exercise of such a right, like the exercise of the right to travel abroad, is of course subject both to the permission of the foreign government involved and to reasonable regulation by the United States Government, within the framework of due process of law. In the *Chicago & Southern*

[45] Petitioner argues that the requirements of due process are especially great here because the Secretary has "branded" petitioner and affixed a "badge of infamy", citing *Peters* v. *Hobby*, 349 U. S. 331, 347; *Wieman* v. *Updegraff*, 344 U. S. 183, 191, and *Cole* v. *Young*, 351 U. S. 536, 546, all cases involving dismissals from government employment. The phrase "badge of infamy" originated in the *Wieman* case, where the Court said of such dismissal that "*In the view of the community*, the stain is a deep one; indeed, it has become a badge of infamy" (344 U. S. at 190, 191; emphasis added). The "badge" is thus something which has practical adverse effects due to community reaction. Here, however, petitioner appears to have applied for a passport largely in order to escape the effects, particularly in terms of employability in his chosen profession, of a "badge" he already wore. See R. 37, 39, 41. We may therefore assume that, even if the Secretary's determination became known, it would not substantially add to petitioner's existing burdens. See note 53, *infra*, p. 98.

case, the Civil Aeronautics Board, with the approval of the President, had granted a certificate of convenience and necessity for an air route to Chicago and Southern Air Lines and had denied one to Waterman Steamship Corporation. Waterman was thus barred from exercising its right, not on the basis of a determination that no air line should operate in the area involved, but on the basis of an individualized determination that Chicago and Southern should be permitted to do so and that Waterman should not.[46] The recommended order of the Civil Aeronautics Board, which had not been made public, had been changed by the President, without revealing the nature of the specific reasons for the change. The President thereafter approved a revised order, which was made public as a final order. The Court did not hold that such a procedure deprived Waterman of its right to engage in business abroad without due process; to the contrary, the Court held that it could not even review the final order. The Court said (*id.* at 111):

> While the changes made at the direction of the President may be identified, the reasons therefor are not disclosed beyond the statement that "because of certain factors relating to our broad national welfare and other matters for which the Chief Executive has special responsibility, he has reached conclusions which require" changes in the Board's opinion.

[46] This Court has said that the *Chicago & Southern* case did "not involve individualized fact finding and classification, but * * * political judgments * * *". *Gonzales* v. *United States*, 348 U. S. 407, 412, note 4. But if that be so, the Secretary's decision here, based in part upon information pertaining to foreign relations, is equally a "political judgment".

> The court below considered, and we think quite rightly, that it could not review such provisions of the order as resulted from Presidential direction. The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. But even if courts could require full disclosure, the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry. *Coleman* v. *Miller*, 307 U. S. 433, 454; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–321; *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.

In the *Curtiss-Wright* case, the Court sustained a criminal indictment charging violation of a Joint Resolution implemented by Presidential proclamation placing an embargo upon the sale of munitions—again, a "right" subject to reasonable regulation—to

persons in certain countries whenever the President proclaimed that such embargo might contribute to the reestablishment of peace. Concerning the President's right to use confidential information in reaching his conclusions, the Court said (299 U. S. at 320–321):

> * * * [The President], not Congress has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted. * * *
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> * * * * *
>
> When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. * * *

Decisions permitting the withholding of sources and details of information to the possible detriment of individuals are not limited to matters arising in connection with control of foreign affairs. In the judicial area, a suit against the Government may not be maintained if it would necessarily lead to the disclosure of a state secret. *Totten* v. *United States,* 92 U. S. 105. In tort actions against the Government, the plaintiff is not entitled to discovery of pertinent Government documents if, "from all the circumstances of the case, * * * there is reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged". *United States* v. *Reynolds,* 345 U. S. 1, 10. Non-disclosure in such a case does not result in judgment for the plaintiff (as the Court of Appeals had held in *Reynolds*), and the Government may continue to litigate.[47] A judge may impose the death sentence upon a duly convicted offender, despite the jury's recommendation of life imprisonment, upon

[47] The *Reynolds* decision demonstrates that the reliance of petitioner (Pet. Br. 30, 47) and *amici* (Brief for *Amici*, pp. 26-27) upon *Jencks* v. *United States*, 353 U. S. 657, and *Communist Party of the United States* v. *Subversive Activities Control Board* (C. A. D. C., No. 11850, decided January 9, 1958), is misplaced. In *Jencks*, the Court said (353 U. S. at 670-671):

> * * * [T]his Court has noticed, in *United States* v. *Reynolds*, 345 U. S. 1, the holdings * * * that, in criminal causes "* * * the Government can invoke its evidentiary privileges only at the price of letting the defendant go free. The rationale of the criminal cases is that, since the Government which prosecutes an accused also has the duty to see that justice is done, it is unconscionable to allow it to undertake prosecution and then invoke its gov-

the basis of information as to the offender's past record given by witnesses with whom the accused has not been confronted and as to whom he has had no opportunity for cross-examination or rebuttal. *Williams* v. *New York,* 337 U. S. 241. Nor is a quasi-judicial hearing required in deciding whether probation once granted should be revoked. *Escoe* v. *Zerbst,* 295 U. S. 490.

Certain cases reviewing administrative actions adverse to individuals based in part upon evidence or sources and details of evidence undisclosed to such individuals have been to the same effect. It is a truism that, even in the absence of an emergency, the standards of notice and hearing equired by due process in administrative proceedings are not necessarily those of a judicial, much less a criminal, proceeding. *Anderson National Bank* v. *Luckett,* 321 U. S. 233; *L. B. Wilson, Inc.* v. *F. C. C.,* 170 F. 2d 793 (C. A. D. C.). In such proceedings, "The Fifth Amendment guarantees no particular form of procedure; it protects substantial rights". *National Labor Relations Board* v. *Mackay,* 304 U. S. 333, 351. "While confrontation may generally be accorded, such is not always the case." This is particularly evident in cases involving, as here,

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ernmental privileges to deprive the accused of anything which might be material to his defense * * *" 345 U. S., at 12.

In the *Reynolds case*, the next sentence was this (345 U. S. at 12; emphasis added):

> *Such rationale has no application in a civil forum where the Government is not the moving party, but is a defendant only on terms to which it has consented.*

[46] See, generally, Davis, *Administrative Law* (1951), chap. 7.

exercises of the war power and of aspects of the foreign relations power. Thus, a citizen eligible for the draft may lawfully be imprisoned for failure to comply with an adverse *individualized* administrative determination which is based in part upon unrevealed information from undisclosed sources, so long as the individual concerned is furnished a "fair résumé" of unfavorable evidence. *United States* v. *Nugent*, 346 U. S. 1, 6.[9] And aliens, who have met every congressionally-established qualification for admission to this country, may be validly denied entry, under 8 U. S. C. 1185, on the basis of "information of a confidential nature, the disclosure of which would

[9] In *Nugent*, the Court did not even qualify its holding by stating that non-disclosure must be based upon the interests of national security. In an article much relied upon by petitioner (Davis, *The Requirement of a Trial-Type Hearing*, 70 Harv. L. Rev. 193 (1956)), Professor Davis criticizes this omission, stating that the court should have held that the individual "is entitled to know all the facts in the file *except to the extent that such an interest as national security clearly requires that particular evidence or its source should not be disclosed*". *Id.* at 248; emphasis added.

Petitioner ignores the *Nugent* case, but relies upon the Davis article and upon another conscientious objector case, *Gonzales* v. *United States*, 348 U. S. 407, to show that the requirements of "individualized" fact finding and "legislative" fact finding differ (Pet. Br. 24–25, 27). But he ignores the fact that *Nugent*, being a selective service case like *Gonzales*, was by definition a case of "individualized" fact finding. *Amici*, on the other hand, attempt to distinguish the conscientious objector cases on the ground that they were "expressly justified, only as an 'exercise of the war power' by means of a statute 'calculated to function in times of peril'" (Brief for *Amici*, pp. 30–31). We believe that this statement expresses the justification for the use of confidential information in passport denials affected by 8 U. S. C. 1185 (see *supra*, p. 35).

be prejudicial to the public interest", and with no hearing whatsoever. The Court so held in the case of an alien wife of an American citizen, *United States ex rel. Knauff* v. *Shaughnessy,* 338 U. S. 537, as well as in the case of a former resident alien, *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206. A long-resident but deportable alien, found to have met the congressionally-established requirements for eligibility for suspension of deportation, may be refused suspension by an inquiry officer on the basis of confidential information, the disclosure of which would be prejudicial to the public interest, safety or security. *Jay* v. *Boyd,* 351 U. S. 345.[50]

(*b*). We have attempted to show (*supra,* pp. 35–45) that the particular circumstances of passport issuance at the present time call for procedural standards different from those applicable in other areas, just as the special circumstances of the cases just cited (*supra,* pp. 87–94) called for departures from what is generally considered the procedural norm. Our view has been recognized by students of these problems. Two academic authorities in the field of administrative law, Professors Kenneth Davis and Louis Jaffe, have explicitly given such recognition. Professor Davis, a severe critic of the general use of undisclosed information by Government officials in administrative pro-

[50] "And the situation is not different because the matter of suspension of deportation is taken up in [what] the [regulations require to be a] 'fair and impartial' deportation 'hearing'. Assuming that such a 'hearing' normally precludes the use of undisclosed information, the 'hearing' here involved necessarily contemplates the use of confidential matter in some circumstances." 351 U. S. at 360.

ceedings, has written that in the particular field of passport issuance "the right of the individual to know the evidence against him may in some circumstances have to yield to some extent to the interest in national security." Davis, *op. cit. supra,* 70 Harv. L. Rev. 193, 262. Professor Jaffe states (Jaffe, *The Right to Travel: The Passport Problem,* 35 Foreign Affairs 17, 27, 28):

> * * * The evil of the secret dossier would * * * be somewhat mitigated if denials were limited to cases in which the Administration was prepared to make a specific finding of the Communist element. But should we condemn the secret dossier absolutely and without exception? Shall we deny the urgency of the Government's argument that if it must reveal its sources of information, its sources may dry up? Does it follow that if we recognize the country's interest in self-defense, we must recognize the secret dossier as a condition of effective action? * * * [The] appeal to our "tradition of fair play" is inconclusive; there have been and continue to be a number of consequences visited upon individuals short of imprisonment for crime which rest upon unrevealed evidence, *e. g.,* exclusion of aliens. The use of secret evidence then is not unknown to us. Yet we may feel that it is wrong, and that the risks we should run from abandoning the practice do not exceed those of the criminal law. Nevertheless, I do not feel a sufficient assurance on the point to urge upon the reader the absolute rejection of the secret dossier.
>
> But it is at this point of demonstrable Communist involvement that I would draw the line.

> We may keep Communist "conspirators" at home because we have determined that the dangers are great and imminent. There may, of course, be other cases of a similar danger: the disclosure of top secrets suggests itself. But no lesser danger should suffice. * * *

The Commission on Government Security has recommended generally that in the operation of governmental security programs confrontation of informants "should be allowed to the maximum extent consistent with the protection of the national security * * *", requiring that no information be considered which has been furnished by persons other than "regularly established confidential informants" unless confrontation is permitted; information supplied by regular informants may be considered if the substance of the information is disclosed and the head of the investigative agency determines that disclosure of identity would prejudice the national interest. See *Report* at, *e. g.*, 66–68. But the Commission excepts the passport program from this general recommendation (*id.* at 494–495):

> The Commission recognizes that its general recommendation with respect to confrontation found elsewhere in this report must be held to be not applicable to the passport security program.
>
> It will be acknowledged that the Secretary of State, in making his decision to refuse or revoke a passport for security reasons, must weigh factors not to be found in other security programs.
>
> Our recommendation for confrontation to the fullest extent possible consistent with the pro-

tection of national security, takes into account the fact that disclosure of the sources and details of confidential information related to the internal security would be detrimental to the national interest by compromising investigative sources and methods.

But these factors, when applied to decisions of the Secretary of State in passport matters, have even broader implications because disclosure of confidential information in the files of the Department of State could very well prejudice the conduct of United States foreign relations.

Security measures and foreign affairs, therefore, are so inextricably interwoven that greater application of the principle of confrontation conceivably could bring serious harm to the national interest.

As long as the substance of confidential information is disclosed to a passport applicant during the processing of the application and subsequent hearing, thus affording him opportunity to rebut, there will not be a serious departure from the degree of confrontation recommended by the Commission.

(*c*). Congress clearly did not intend that the operation of the travel control system be subject to the procedural protections of a criminal trial (*supra*, pp. 36–43), and petitioner can point to no Supreme Court or appellate decisions which say that the Due Process Clause requires such protections. With the exception of *Parker* v. *Lester*, 227 F. 2d 708 (C. A. 9), none of the cases cited by petitioner or *amici*, for the proposition that administrative action may not be predicated upon undisclosed information, involved

a statute or regulations whose operation was predicated on the war power; and in many of the cited cases in which information was withheld, the reasons for doing so were not based upon the interests of national security. *Parker* v. *Lester, supra,* aside from the fact that it is in no way controlling in this Court, is readily distinguishable and not in any true conflict with the present case. The court below, after citing *Parker,* found it necessary only to indicate that, in exercising the passport power, the Secretary of State takes foreign policy considerations into account (see Prettyman, J., in No. 481, R. 195)—unlike the Commandant of the Coast Guard in conducting the port security program. There are numerous other distinctions. In view of the heavy reliance upon that case by both petitioner (Pet. Br. 12, 28–29, 35) and *amici* (Brief for *Amici,* pp. 9, 17–24),[51] it is well to note these distinctions in order to demonstrate that, even if *Parker* v. *Lester*[52] was correctly decided, it would not be dispositive of the issues presented here.

To begin with, there is a plain difference between the *ex parte* cancellation of a certificate without which a seaman may not lawfully obtain employment in his chosen field,[53] and the issuance of a document, tradi-

[51] See *supra,* note 44, p. 81.

[52] We shall refer to the following opinions in that case: 98 F. Supp. 300 (N. D. Cal.); 112 F. Supp. 433 (N. D. Cal.), reversed and remanded, 227 F. 2d 708 (C. A. 9); *Lester* v. *Parker,* 235 F. 2d 787 (C. A. 9), rehearing denied, 237 F. 2d 698.

[53] It is argued that the denial of petitioner's passport has deprived him of his right to work as well as of his right to travel (see Pet. Br. 70; Brief for *Amici,* p. 13). This is in effect an attempt to burden the Secretary with responsibility for the very circumstances which caused petitioner to seek a

tionally issued by the Secretary of State in the discretionary exercise of his foreign affairs power, without which citizens today may not depart from the United States for travel to certain countries. There is also a marked contrast between the procedures accorded the plaintiffs in *Parker* and those accorded petitioner here.

The events in *Parker* began, not with applications for clearance certificates in order that the applicants might take up the occupation of seamen, but with *ex parte* termination of the plaintiffs' existing means of livelihood with no "notice prior to the initial determination by the Commandant that they could no longer be employed on board ships" (227 F. 2d 708 at 716), and with "no opportunity to participate in the process of examining the facts which may have a bearing upon this initial determination" (*id.* at 711). Thereafter, each plaintiff was sent an identical form letter purportedly informing him of the "general basis" for the denial of clearance; at subsequent hearings in the cases of those plaintiffs finally denied clearance, the examiner declined to address any questions to one of the plaintiffs; and in no proceedings did witnesses appear against the plaintiffs (112 F. Supp. 433). It is further apparent from the various court opinions in the case that at no time were the plaintiffs furnished with information substantially more specific than that the denial of clearance was

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passport: his inability to obtain employment in his chosen field in the United States. The denial of a passport has not destroyed petitioner's livelihood but at most has prevented him from taking advantage of one opportunity to remedy the unfavorable employment situation in which he now finds himself.

"based on the belief that you are affiliated with, or sympathetic to an organization, association, group, or combination of persons subversive or disloyal to the Government of the United States," although in at least one instance the Communist Party was specifically named (112 F. Supp. at 439).

In ruling that these procedures were deficient under the Fifth Amendment, the Court of Appeals for the Ninth Circuit made clear the particular aspects of the procedures to which it took exception. The District Court had entered a decree permitting the plaintiffs to demand a bill of particulars but specifying that "such bill of particulars need not set forth the source of such data, nor disclose the data with such specificity that the identity of *any* informers who have supplied such allegations or data will necessarily be disclosed to the said seaman or other persons" (227 F. 2d at 711; emphasis added). Subsequent to this decree and prior to the appeal, the Coast Guard amended its regulations to bring them into substantial conformance with the decree.[34] The Court of Appeals ruled that under this decree and the resulting regulations the plaintiffs would not be assured of notice sufficient to meet charges against them, specifically contrasting (*id.* at 715, note 11a) the new Coast Guard

[34] "The statement of the basis for the action taken under subparagraph (1) or (2) of this paragraph shall be worded with such specificity as to afford such person an opportunity to marshal evidence in refutation thereof, and otherwise in his behalf. This statement *shall not* be worded with such particularity as to disclose the source of such information or data, nor the identity of *any* person or persons who may have furnished such information or data, to said person or other persons." 227 F. 2d at 711, fn. 5; emphasis added.

regulation with the regulations considered in *National Lawyers Guild* v. *Brownell*, 225 F. 2d 552 (C. A. D. C.), certiorari denied, 351 U. S. 927—regulations providing "for notice, hearings, and a determination upon the record, *except for classified security information*" (225 F. 2d at 556; emphasis added). It is plain that the Ninth Circuit was objecting to the provisions of the Coast Guard regulation which absolutely precluded the disclosure of *all* sources of information and the identity of *all* informants, with no limitation as to the need for such non-disclosure in terms of national security. The true scope of the opinion may be gleaned from the discussion at 227 F. 2d 722, where the court compares its decision with its prior decision in *United States* v. *Gray*, 207 F. 2d 237 (C. A. 9). Indeed, the court made plain the limited nature of its condemnation of the use of confidential information. Its opinion closed with these significant words (227 F. 2d at 723–724; emphasis added):

> * * * we have no occasion to hold whether in subsequent attempts to carry out the objectives of the merchant seamen screening program regulations might be adopted which *in some degree qualify the ordinary right to confrontation and cross-examination of informers.* It is sufficient to say that *as framed and operated* these regulations fall short of furnishing the minimum requirements of due process in respect to notice and opportunity to be heard.

As petitioner has noted, "the Coast Guard has [now] revised its regulations to comport with the court's ruling * * *" (Pet. Br. 29, note 10)—by providing for the withholding of information and sources

only where this is required in the interest of national security. See 21 F. R. 2814; see also *Lester* v. *Parker*, 235 F. 2d 787 (C. A. 9), rehearing denied, 237 F. 2d 698.

In the present case, non-disclosure of information and sources has similarly been limited to cases where revelation would imperil internal security, or the conduct of foreign affairs. Far from refusing to disclose the identity of any informants, the Department of State not only disclosed to petitioner the identity of three informants but produced them as witnesses for purposes of confrontation and cross-examination. *Supra*, pp. 13–17. In this light, *Parker* v. *Lester* is neither in conflict with the decision below nor persuasive on behalf of petitioner.[55]

4. *There are no practical alternatives to the use of undisclosed sources and information in the operation of the travel control program.*—We have stressed that the travel control program authorized by 8 U. S. C. 1185 has the rationale of restricting travel on a limited evidentiary basis—limited both as to the substance of the evidence and its availability to the passport applicant. See, *e. g.*, *supra*, pp. 36–45. If full disclosure and iron-clad proof were required, the program would serve no real purpose. But even if this were not so, as a practical matter, the Secretary could not provide the full confrontation and cross-examination in passport proceedings which petitioner seeks. The only course open to the Secretary would be to abandon his

[55] The summary of the *Parker* case suffices to explain the Government's decision not to petition for certiorari in that case.

attempts to exercise the power and duty given him by Congress and the President to restrict travel in the national interest.

From the example of the present case, we see that the Board of Passport Appeals may be able to induce informants to appear in person to confront the applicant and to subject themselves to cross-examination for his benefit. But the Board could not have required this, since it has no power to subpoena witnesses, nor to coerce testimony if witnesses appear voluntarily (R. 60, 173, 188, 232, 270; see also *Report of the Commission on Government Security* (1957), p. xviii). Cf. *Deviny* v. *Campbell*, 194 F. 2d 876, 880 (C. A. D. C.). No funds for witness fees or travel expenses are available. Except insofar as informants may be willing to pursue the commendable course followed by the Elwyns in this case, the Secretary must therefore rely upon what information he is able to develop from his own investigations, information furnished by other governmental departments, and information submitted by the applicant himself. Moreover, other governmental agencies furnish classified information to the Secretary of State only on condition that it not be disclosed or compromised,[56] as is indicated at pp. 67–68 of the Record. And even if the reports furnished by other agencies were furnished to petitioner, his objections to the hearsay nature of such information would not be overcome unless the other agency's sources could be persuaded to testify.

[56] See Comment, *The Use of Undisclosed Evidence by Government Officials in Administrative and Judicial Proceedings*, 45 Calif. L. Rev. 524, 530.

As for the confidential information which, if disclosed, might prejudice the conduct of our foreign relations, it is unthinkable that the Secretary should be compelled to disclose this. But even if the Secretary were willing to divulge the information, the cross-examination of the informant might well require the recall of our diplomatic and consular representatives—even possibly the ambassador himself—from diplomatic posts abroad.

What petitioner asks, therefore, is that the Court, by reversing the decision below, not only drain 8 U. S. C. 1185 of vitality, but place permanently disabling restrictions upon the Government's power to enforce reasonable travel controls in times of war and emergency. We submit that petitioner's interests are not sufficient to require so grave a result. He has not been subjected to a criminal trial or punishment. He cannot travel to India because his application for a passport was denied, after administrative proceedings with procedural protections for his benefit, on the adequate ground that the Secretary of State had reason to believe that his travel to India was intended to further the Communist movement.

In these circumstances, petitioner was accorded due process of law. He is not entitled to more; he is not entitled to demand that the Secretary of State must act contrary to the national interest by either abandoning travel controls or jeopardizing the Government's intelligence network and its foreign relations.[37]

[37] Petitioner and *amici* both argue as a separate point that the hearing requirements of Section 5 of the Administrative Procedure Act are applicable to passport decisions and have not been complied with (Pet. Br. 44–46; Brief for *Amici*, pp. 32–

IV

THE DENIAL OF A PASSPORT TO PETITIONER DID NOT VIOLATE HIS RIGHTS UNDER THE FIRST AMENDMENT

In the Brief for Respondent in No. 481 we demonstrated that, as a general proposition, First Amendment rights are not violated by the denial of a pass-

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34). Petitioner acknowledges that this question was not raised in the petition (Pet. Br. 3, note 1). Consideration of the question is therefore precluded by Rule 23 (1) (c) of the Rules of this Court. Only recently the Court has said in a similar situation that "the question was not mentioned in the petition for certiorari filed in this Court. Our Rule 23 (1) (c) provides, in pertinent part: 'Only the questions set forth in the petition or fairly comprised therein will be considered by the court.' The question is not proper here. Cf. *Irvine* v. *California*, 347 U. S. 128, 129." *Lawn* v. *United States*, 355 U. S. 339, 363, note 16. In the *Irvine* case, the Court said: "We disapprove the practice of smuggling additional questions into a case after we grant certiorari. The issues here are fixed by the petition unless we limit the grant * * *. We do not take up the questions * * * because they are improperly presented." 347 U. S. 128, 129–130.

The failure of the court below to rule in petitioner's favor on the basis of this asserted ground was obviously not "plain error" as petitioner contends (Pet. Br. 3, note 1). Numerous litigants in that court have similarly argued that the Administrative Procedure Act provisions apply here; indeed, petitioner raised the issue in the court below by a one-sentence reference to the argument in another case (see Brief for Appellant, C. A. D. C. No. 13717, pp. 49–50). No member of the court has ever thought it necessary even to refer to the argument, whether in a majority or dissenting opinion, despite the fact that if petitioner is correct the constitutional issues below could all have been avoided. The reasons for this are clear. Section 5 applies only to cases "of adjudication *required by statute to be determined on the record after opportunity for an agency hearing*, except to the extent that there is involved * * * (4) the conduct of military, naval, or *foreign affairs functions* * * *" (5 U. S. C. 1004; emphasis added). Section 5 thus does not apply by its terms, since there is no statutory hearing re-

port on grounds related to Communist activity (pp. 97–100). Those arguments are applicable to the passport denial here, based upon the Secretary's "reason to believe, on the balance of all the evidence, that [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" (R. 278, *supra*, p. 22). The language of this finding so obviously shows that the denial of the passport is designed to prevent the evils of future conduct and not to "punish" petitioner for past conduct as to require no discussion of petitioner's *ex post facto* and "bill of attainder" arguments. The same arguments are answered in full in the Brief for the Respondent in No. 481 at pp. 81–85. In Point II in this brief, we have also demonstrated that the consideration of petitioner's associations did not violate his First Amendment rights (*supra*, pp. 62–63).

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quirement with respect to passport issuance, as the Senate Committee noted (Senate Judiciary Committee Print, June 1945, Sen. Doc. No. 248, 79th Cong., 2d Sess., p. 12): "Since [the passport and visa] functions are not required by statute to be made upon administrative hearing, sections 5, 7, and 8 relating to adjudications, hearings, and decisions are inapplicable." The congressional intent that there be no full evidentiary proceedings in the operation of the travel control program (*supra*, pp. 35–42) is also persuasive. Moreover, the foreign affairs exception would appear to apply to passport decisions. See Attorney General's Manual on the Administrative Procedure Act (1947), p. 27. *Wong Yang Sung* v. *McGrath*, 339 U. S. 33, does not aid petitioner (see Pet. Br. 44). There, the Court was dealing with a statute into which a hearing requirement had been read by the Court in previous cases decided prior to the enactment of the Administrative Procedure Act and prior to the reenactment of the deportation statute in question. See 339 U. S. at 48, fn. 30.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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MARCH 1958.

APPENDIX

The pertinent portions of the regulations issued by the Secretary of State, as found in Part 51 of Title 22 of the 1956 Supplement to the Code of Federal Regulations, are as follows:

(*a*) From Departmental Regulation No. 108.162, August 28, 1952, 17 F. R. 8013,[1] as amended by Departmental Regulation No. 108.276, January 10, 1956, 21 F. R. 336:

§ 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*

In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:

(a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to

[1] The preamble to this regulation reads as follows:

Pursuant to the authority vested in me by paragraph 126 of Executive Order No. 7856, issued on March 31, 1938 (3 F. R. 681; 22 CFR 51.77), under authority of section 1 of the Act of Congress approved July 3, 1926 (44 Stat. 887; 22 U. S. C. 211 (a)), the regulations issued on March 31, 1938 (Departmental Order 749) as amended (22 CFR 51.101 to 51.134) are hereby further amended by the addition of new sections 51.135 to 51.143 as follows: * * *

act in furtherance of the interests and under the discipline of the Communist party;

(b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;

(c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

§ 51.136.[2] *Limitations on issuance of passports to certain other persons.*

In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (a) violate the laws of the United States; (b) be prejudicial to the orderly conduct of foreign relations; or (c) otherwise be prejudicial to the interests of the United States.

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[2] Prior to the amendment of January 10, 1956, this section read as follows:

§ 51.136. *Limitations on issuance of passports to persons likely to violate laws of the United States*

In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*

A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138. *Appeal by passport applicant.*—In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139. *Creation and functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of

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persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States.

Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138. The Board shall adopt and make public its own rules of procedure, to be approved by the Secretary, which shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140. *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*—It shall be the duty of the Board, on all the evidence, to advise the Secretary of the action it finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141. *Bases for findings of fact by Board [of Passport Appeals].*

(a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135 (b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*

At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to sub-

scribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.[3] *Applicability of §§ 51.137–51.142.*

Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137–51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of such person to receive or use a passport.

(*b*) From Departmental Regulation No. 108.210, January 4, 1954, 19 F. R. 161:

RULES OF THE BOARD OF PASSPORT APPEALS

§ 51.151 *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secre-

[3] Prior to the amendment of January 10, 1956, this section read as follows:

§ 51.143 *Applicability of § 51.135 to § 51.142.*

When the standards set out in § 51.135 or § 51.136 are made relevant by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137 to 51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case.

tary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152 *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153 *Counsel to the Board.*—A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his procedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154 *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155 *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156 *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply

with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157 *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reasons stated by the Passport Office for its decision.

§ 51.158 *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by registered mail, or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159 *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writing of the scheduled date and place of hearing which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160 *Appearance.*—Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161. *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case

of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162 *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163 *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths or affirmations for the purpose

of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164 *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and/or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165 *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166 *Privacy of hearings.*—Hearings shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned, the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167 *Misbehavior before Board.*—If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168 *Transcript of hearings.*—A complete verbatim stenographic transcript shall be

made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169 *Notice of decision.*—The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170 *Probative value of evidence.*—In determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.

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